APPENDIX

APPENDIX A

REMITTUR

SUPREME COURT OF GEORGIA

September 16, 2025

Case No. S25C0969

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

SUNTRUST BANK v. CHARLES DANIEL BICKERSTAFF et al..

Upon consideration of the petition for a writ of certiorari filed to review the judgment of the Court of Appeals in this case, the following judgment has been rendered:

Judgment denied. All the Justices concur, except Peterson, C. J., disqualified, and LaGrua and Land, JJ., not participating.

The remittitur shall be transmitted to that court with the attached decision.

Associated Cases

A24A1700, A24A1701, A24A1702

Costs paid: $300

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, October 01, 2025

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

Thérèse S. Barnes, Clerk

APPENDIX B

FOURTH DIVISION
DILLARD, P. J.,
BROWN and PADGET, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. https://www.gaappeals.us/rules

February 20, 2025

In the Court of Appeals of Georgia

A24A1700. SUNTRUST BANK v. BICKERSTAFF et al.; A24A1701. BICKERSTAFF et al. v. SUNTRUST BANK; A24A1702. SUNTRUST BANK v. BICKERSTAFF et al.

PADGETT, Judge.

These related appeals arise from a complaint filed by Jeff Bickerstaff, Jr.,[1] a customer of SunTrust Bank ("SunTrust"). On July 12, 2010, Bickerstaff filed a complaint against SunTrust on behalf of himself and all others similarly situated asserting that SunTrust's overdraft fees constitute unlawful interest charges and raising claims for violation of Georgia's civil and criminal

[1] Jeff Bickerstaff, Jr. passed away in 2014. In 2015, the Supreme Court corrected the style of the case to read as follows: *Ellen Rambo Bickerstaff v. SunTrust Bank*. In March 2023, the Court entered an Order substituting Charles Daniel Bickerstaff as Plaintiff and as Class Representative and the case was styled as: *Charles Daniel Bickerstaff, as Administrator of the Estate of Jeff Bickerstaff, Jr., on behalf of himself and others similarly situated, Plaintiff v. SunTrust Bank, Defendant.*

usury laws (OCGA §§ 7-4-2 and 7-4-18, respectively), money had and received, and conversion.

Factual background and procedural history

This is the fifth appearance of this case on appeal. In *Bickerstaff v. SunTrust Bank*, 332 Ga. App. 121, 122 (770 SE2d 903) (2015) ("*Bickerstaff I*"), this Court affirmed the trial court's order denying SunTrust's motion to compel arbitration and Bickerstaff's motion for class certification. Our Supreme Court granted Bickerstaff's petition for certiorari review and *Bickerstaff v. SunTrust Bank*, 299 Ga. 459 (788 SE2d 787) (2016) ("*Bickerstaff II*") followed. In *Bickerstaff II*, the Supreme Court reversed our decision, holding "the terms of the arbitration rejection provision of SunTrust's deposit agreement [did] not prevent Bickerstaff's class action complaint from tolling the contractual limitation for rejecting that provision on behalf of all putative class members until such time as the class may be certified and each member makes the election to opt out or remain in the class." 299 Ga. at 470.[2] Thereafter, in *Bickerstaff v. SunTrust Bank*, 340 Ga. App. 43 (796 SE2d 9) (2017) ("*Bickerstaff III*"), this Court remanded the case to the trial court to rule on the issue of whether SunTrust waived its right to compel arbitration against putative class members other than Bickerstaff if and when a class was certified. 340 Ga. App. at 44. The trial court ultimately found that all the requirements of OCGA § 9-11-23 were met and certified the class as follows:

[e]very Georgia citizen who had or has one or

[2] SunTrust filed a petition for writ of certiorari to the United States Supreme Court, which was denied. See *SunTrust v. Bickerstaff*, 580 U.S. 1020, 137 SCt 571 (196 LE2d 447) (2016).

> more accounts with SunTrust Bank and who, from July 12, 2006, to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees.

SunTrust appealed, and in *SunTrust Bank v. Bickerstaff*, 349 Ga. App. 794 (824 SE2d 717) (2019) ("*Bickerstaff IV*"), this Court held the trial court did not abuse its discretion in certifying the class. 349 Ga. App. at 804.

After the close of discovery, the trial court issued an omnibus order in March 2024 deciding several of the parties' various motions. The trial court denied SunTrust's motion to dismiss for insufficiency of process, denied in part SunTrust's motion to compel arbitration as to certain account holders and class members, but granted the motion to compel arbitration as to depositors who closed their accounts before June 1, 2010, granted SunTrust's motion to modify the class definition by adding language that a class member is: "[a] person who was a Georgia citizen on the date Plaintiff filed this Complaint, and has thereafter continuously remained through October 6, 2017, a citizen of Georgia . . . [,]" denied SunTrust's motion for summary judgment on the question of whether overdraft fees constituted interest, found that 2014 legislative changes to the usury statute did not apply to this litigation, denied SunTrust's motion for summary judgment on the issue of intent, granted SunTrust's motion for summary judgment on Bickerstaff's claims for criminal usury, and granted SunTrust summary judgment as to claims that accrued before July 12, 2009, holding they were barred by the one-year statute of limitations for

usury. These appeals followed.[3]

In Case Nos. A24A1700 and A24A1702, SunTrust argues that the trial court erred in: (1) denying SunTrust's motion to dismiss for insufficient service of process ; (2) denying its motion to compel two groups of class members to arbitration; (3) denying its motion for summary judgment on the question of whether its overdraft coverage is a loan or advance of money; (4) denying SunTrust summary judgment on the question of whether its overdraft fees were interest ; (5) holding that a usury plaintiff "need not prove the defendant's intent to violate the law, and therefore, denying SunTrust summary judgment on the question of whether it intended to violate the law by offering overdraft coverage; and (6) denying SunTrust summary judgment as to claims arising after the 2014 amendment to Georgia's usury law.

In Case No. A24A1701, Bickerstaff argues that the trial court erred in: (1) changing the class definition to require class members to have been Georgia citizens continuously from the date the complaint was filed to October 6, 2017; (2) entering summary judgment in favor of SunTrust and barring all claims accruing before July 12, 2009, due to the usury statute of limitations; and (3) compelling class members who closed their accounts before June 1, 2010, to arbitrate. For the reasons that follow, we affirm in part, and reverse in part.

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[3] Case No. A24A1700 is SunTrust's appeal from portions of the March 2024 omnibus order. Case No. A24A1701 is Bickerstaff's appeal from the same order. Case No. A24A1702 is SunTrust's cross-appeal from Bickerstaff's appeal. We granted SunTrust's unopposed motion to consolidate Case Nos. A24A1700 and A24A1702, which are substantively the same.

Case Nos. A24A1700 and A24A1702

1. SunTrust argues the trial court failed to enforce OCGA § 9-11-4's jurisdictional requirement that a summons must be issued and signed by the clerk. SunTrust claims it was served with a proposed summons form eFiled by Bickerstaff's counsel and containing a blank signature line. "A trial court's ruling on a motion to dismiss a complaint for insufficient service of process will be upheld on appeal absent a showing of an abuse of discretion. Factual disputes regarding service are to be resolved by the trial court, and the court's findings will be upheld if there is any evidence to support them." *Griffin v. Stewart*, 362 Ga. App. 669, 669 (870 SE2d 3) (2022) (citations and punctuation omitted). OCGA § 9-11-4 (a) and (b) provide "[u]pon the filing of the complaint, the clerk shall . . . issue a summons [and] . . . [t]he summons shall be signed by the clerk." "The issuance of a summons signed by the clerk is a necessary part of acquisition of jurisdiction." *Diaz v. First Nat. Bank,* 144 Ga. App. 582, 583 (1) (241 SE2d 467) (1978).

Here, as noted by the trial court, the summons is stamped "Efiled," dated July 12, 2010, and bears the name of Mark Harper, Clerk. And according to State Court of Fulton County Local E-Filing Rule 2-106, "[e]very pleading, document, and instrument electronically filed or served shall be deemed to have been signed by the Judge, clerk, attorney or declarant and shall bear the typed name, address, telephone number and Bar number of a signing attorney." The trial court ruled that the summons was deemed to be electronically signed by the Clerk when filed. Further, SunTrust has been involved in this litigation for over 14 years. "[W]here it is clear that the defendant has been served, has appeared and has been

heard on the merits of the controversy, the proceeding should not be vitiated by objections going merely to the form of process." *See Tyree v. Jackson*, 226 Ga. 690, 693 (1) (177 SE2d 160) (1970). For these reasons, we find no abuse of discretion in the trial court's ruling on this issue.

2. Next, SunTrust argues the trial court erred by failing to compel two groups of class members to arbitrate. "This Court reviews the grant or denial of a motion to compel arbitration de novo to see if the trial court's decision is correct as a matter of law; but we defer to the trial court's factual findings unless they are clearly erroneous." *Smith v. Adventure Air Sports Kennesaw, LLC*, 357 Ga. App. 1, 1 (849 SE2d 738) (2020) (citations and punctuation omitted). SunTrust argues the trial court should have compelled class members who opened their account or were first charged an overdraft fee after July 12, 2010, and class members subject to different arbitration agreements than Bickerstaff, to arbitrate. "Under the 'law of the case' doctrine, any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be." *Southern States Chem. v. Tampa Tank & Welding*, 316 Ga. 701, 716(3) (888 SE2d 553) (2023) (citation and punctuation omitted). In *Bickerstaff II*, our Supreme Court held Bickerstaff's filing of the complaint tolled the time to opt out of arbitration on behalf of *all* putative class members. 299 Ga. at 468-469 (1) (b). The Supreme Court did not limit its holding to those depositors whose arbitration provisions were identical to Bickerstaff's. The putative class covered by the Supreme Court's ruling in *Bickerstaff II* included depositors who paid overdraft fees through the date of

class certification, including under amended deposit agreements with different arbitration provisions than Bickerstaff's. Therefore, we cannot say the trial court erred by denying SunTrust's motion to compel arbitration as to these two groups under the law of the case doctrine.

3. SunTrust argues the trial court erred in determining that SunTrust's overdraft coverage "constitutes an advance of funds to its depositors." SunTrust cites to *Ruth v. Cherokee Funding LLC*, 304 Ga. 574 (820 SE2d 704) (2018), to argue the overdraft program is not a "loan" or "advance" because there can be no loan or advance where "the obligation to repay is only contingent and limited." Id. at 579 (3). In that case, the repayment of the funds was contingent on the party winning their lawsuit. Id. at 574-575 (1). In this case, SunTrust's overdraft program is not similarly contingent, but is an advance of funds to cover withdrawals for which SunTrust expected repayment. SunTrust's internal procedures defined an overdraft as "the extension of unsecured credit . . ." Again, we cannot say the trial court erred in concluding SunTrust's overdraft program constituted an advance of funds. See *West v. Fed. Deposit Ins. Corp.*, 149 Ga. App. 342, 345-346 (2) (a) (254 SE2d. 392) (1979) (bank may recover the amount of an overdraft from a depositor in the same manner in which it could recover an amount loaned to a customer in the regular course of business).

4. SunTrust argues the trial court erred in determining its overdraft fees are subject to the usury law because the flat fee charged when the overdraft is processed is not interest. SunTrust claims its overdraft fees do not fall within Georgia's civil usury statute which defines interest as "a charge for the use of money

computed over the term of the contract at the rate stated in the contract or precomputed at a stated rate on the scheduled principal balance or computed in any other way or any other form," OCGA § 7-4-2 (A) (3), because the fee is a flat fee and not based on the time value of money.

> To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, the theory that a contract will be usurious or not according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance.

BankWest, Inc. v. Oxendine, 266 Ga. App. 771, 776 (1) (598 SE2d 343) (2004) (citation and punctuation omitted). "Where a transaction is not per se usurious, if it is claimed to be a device to cover up a charge of usury, a question of fact is raised as well as a question of law and it should be submitted to a jur*y." Knight v. First Fed. Sav. & Loan Assn., Savannah*, 151 Ga. App. 447, 452 (2) (260 SE2d 511) (1979). Where "there be doubt as to whether the transaction is a cover for usury or a perfectly fair one authorized by law, then it is a question for the jury to determine, from all the facts and circumstances of the case, whether the transaction disclosed is one bona fide, in the ordinary course of business. . . ." Id. at 453 (2) (citation and punctuation omitted). Here, the trial court did not err in determining that whether overdraft fees constituted interest is a question of fact for the jury.

5. SunTrust argues the trial court erred in denying it summary judgment because it did not intend to violate the

usury law. "On appeal from the grant or denial of summary judgment, we apply a de novo standard of review." *Ga. Cash America, Inc. v. Greene*, 318 Ga. App. 355, 358 (2) (734 SE2d 67) (2012) (citation and punctuation omitted). "[T]he moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." *Lau's Corp. v. Haskins*, 261 Ga. 491, 491 (405 SE2d. 474) (1991). "To constitute usury in this state it is essential that there be, at the time the contract is executed, an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law." *Dorfman v. Briah Assoc.*, 160 Ga. App. 359, 360 (287 SE2d 75) (1981) (citation and punctuation omitted). Generally, the question of intent and the truth of the transaction is a jury question. Id. Here, the trial court correctly denied summary judgment and ruled intent was to be determined by the jury. Bickerstaff pointed to SunTrust's internal documents including an email that set forth the minimum amounts for paid items for which a $35 overdraft fee would not exceed the interest allowed under the usury statute for different time periods. Further, Bickerstaff pointed to several internal documents in which SunTrust defined overdraft fees as "an extension of unsecured credit" and considered the overdraft fees "critical to SunTrust's profitability." SunTrust argues it believed the overdraft program was lawful in light of a 2013 Georgia Department of Banking and Finance Order and the 2014 amendment to the usury law. We cannot say the trial court erred in determining there is a genuine issue of material fact as to whether SunTrust acted with usurious intent.

6. SunTrust argues the trial court erred in denying

SunTrust summary judgment as to claims that arose after the 2014 amendment to the usury statute. We agree.

In 2014, the Georgia Legislature amended the usury statute by adding OCGA § 7-4-2 (d), which provides:

> Notwithstanding the foregoing, fees and other charges agreed upon by a financial institution and depositor, as defined in Code Section 7-1-4, in a written agreement governing a deposit, share, or other account, including but not limited, to overdraft and nonsufficient funds, delinquency or default charges, returned payment charges stop payment charges or automated teller machine charges, shall not be considered interest.

The legislature clarified its intent was not to effect the law applicable to litigation pending as of February 19, 2014. See Ga. L. 2014, pp. 213-214, §2. However, any overdraft fees assessed after April 15, 2014, the law's effective date, could not be determined to be usurious because the legislature determined overdraft fees shall not be considered interest. Individuals who incurred an overdraft fee after April 15, 2014, could not bring a claim on their own. This Court has stated an individual may not do indirectly what they would not have been permitted to do directly. See *Speer, Inc. v. Manis*, 164 Ga. App. 460, 460 (297 SE2d 374) (1982) (citation and punctuation omitted). Therefore, an individual who incurred an overdraft fee after April 15, 2014, could not sue SunTrust directly for violations of the usury law because the law was clear at that time that overdraft fees did not constitute interest. OCGA § 7-4-2 (d). Further, after the amendment SunTrust could not have had the requisite intent to charge

interest in an amount that violated the usury statute because the overdraft fees were no longer considered interest. Therefore, the trial court erred in denying SunTrust summary judgment as to claims that arose after the 2014 amendment.

Case No. A24A1701

7. Bickerstaff argues the trial court erred in modifying the class definition by inserting a continuous-citizenship requirement.

> The trial court is vested with broad discretion to decide whether to certify a class, and absent an abuse of that discretion, we will not disturb the trial court's decision. Implicit in this deferential standard of review is a recognition of the fact-intensive basis of the certification inquiry and of the trial court's inherent power to manage and control pending litigation. Thus, we will affirm the trial court's factual findings unless they are clearly erroneous. Under the clearly erroneous test, factual findings must be affirmed if supported by any evidence.

Atlanta Postal Credit Union v. Holiday, 367 Ga. App. 168, 175 (2) (885 SE2d 196) (2023) (citations and punctuation omitted). "It bears emphasis that certification orders are 'inherently tentative,' and the trial court retains jurisdiction to modify or even vacate them as may be warranted by subsequent events in the litigation." *Fortis Ins. Co.* v. *Kahn*, 299 Ga. App. 319, 326 (4) (683 SE2d 4) (2009) (citation and punctuation omitted). Following *Bickerstaff II*, upon remand the trial court found that all of the requirements of OCGA § 9-11-23 were met and certified the class as follows:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction ("the Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees.

On appeal in *Bickerstaff IV*, this Court concluded the trial court did not abuse its discretion in certifying the class. *Bickerstaff IV,* 394 Ga. App. at 804. After *Bickerstaff IV,* the parties engaged in years of discovery. Upon SunTrust's renewed motion to modify the class definition, the trial court granted the motion in part to provide "clarity" to the definition by specifying what is required of citizenship as:

> Every **person who was a Georgia citizen on the date Plaintiff filed this Complaint, and has thereafter continuously remained through October 6, 2017, a citizen of Georgia** who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

(emphasis supplied).

The trial court explicitly stated that "the Court does not believe it is necessary to modify the class definition, because the Class Definition was not altered." Bickerstaff argues that a modification requires a "new event," but this

Court has noted that certification orders are "inherently tentative, and the trial court retains jurisdiction to modify or even vacate them as may be warranted by subsequent events in the litigation." *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 378 (2) (c) (634 SE2d 123) (2006) (citations and punctuation omitted). Further, under OCGA § 9-11-23 (c) (1) a "[class-certification] order under this subsection may be conditional, and may be altered or amended before the decision on the merits." Therefore, if the trial court "modified" the class definition, it came after a subsequent event in the litigation — the parties engaging in discovery — and before a decision on the merits. As a result, we can not say the trial court abused its discretion in "clarifying" the class definition. See *J. M. I. C. Life Ins. Co.*, 280 Ga. App. at 378 (2) (c).

8. Bickerstaff argues the trial court erred by barring all claims accruing before July 12, 2009, including his claims for conversion and money had and received,[4] on the basis that those claims are governed by the one-year statute of limitation period for usury. We agree.

The trial court determined the one-year limitation period for usury was applicable to Bickerstaff's common law claims for conversion and money had and received. The trial court concluded the class cannot avoid the usury limitation by alleging common law claims that are based

[4] Conversion has a four-year statute of limitation period. See OCGA § 9-3-32 ("Actions for the recovery of personal property, or for damages for the conversion . . . of the same, shall be brought within four years after the right of action accrues[.]"); Money had and received has a four-year statute of limitation period. See OCGA § 9-3-25; see also *Macomber v. First Union Nat. Bank of Ga.*, 212 Ga. App. 57, 58 (1) (441 SE2d 276) (1994) (the statute of limitation in an action for money had and received is four years).

solely on alleged usurious interest. "Under Georgia law, plaintiffs are permitted to pursue alternative theories of relief based on causes of action with different elements, even when those causes of action arise from the same underlying conduct." *Titshaw v. Geer*, 320 Ga. 128, 138 (3) (c) (907 SE2d 835) (2024). Therefore, to determine what statute of limitation period applies we must first determine the elements of each claim.

> There are four requisites of every usurious transaction: (1) A loan or forbearance of money, either express or implied. (2) Upon an understanding that the principal shall or may be returned. (3) And that for such loan or forbearance a greater profit than is authorized by law *shall be paid or is agreed to be paid.* (4) That the contract was made with an intent to violate the law.

Knight, 151 Ga. App. at 449 (1) (citations and punctuation omitted, emphasis in original). By contrast, "[a] claim for money had and received contains the following elements: a person has received money of the other that in equity and good conscience he should not be permitted to keep; demand for repayment has been made; and the demand was refused." *Wilson v. Wernowsky*, 355 Ga. App. 834, 843 (2) (b) (846 SE2d 101) (2020) (citation and punctuation omitted).

"Conversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation." *City of Atlanta v. Hotels.com, L. P.*, 332

Ga. App. 888, 890-891 (2) (a) (775 SE2d 276) (2015) (citation and punctuation omitted). "To establish a claim for conversion, a plaintiff must show (1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property." Id. at 891 (2) (a) (citation and punctuation omitted).

Claims for usury, money had and received, and conversion are each different causes of action that include different elements. The trial court determined that because a finding of usury was a condition precedent to prevailing on the claims for money had and received and conversion, then the statute of limitations for usury applied to all claims. This is not true. Each claim must be analyzed separately to determine when the right of action accrued for that particular claim. See *Titshaw*, 320 Ga. at 139 (3) (c). While Bickerstaff has conceded that in order to prevail on the common law claims, there must be a finding of usury, this does not mean the usury statute of limitations automatically applies to his conversion and money had and received claims. Our Supreme Court has stated "which statute of limitation applies to a claim turns on the nature of the cause of action at issue." Id. The correct statute of limitation period is the period defined for conversion and money had and received. Therefore, the trial court erred in concluding that the one-year statute of limitations period for usury barred all claims that accrued before July 12, 2009.

9. Next, Bickerstaff argues the trial court erred by compelling arbitration for depositors who closed their accounts before June 1, 2010. Bickerstaff argues SunTrust waived its arbitration arguments by failing to raise them in prior appeals, that the trial court's ruling

contradicts the law of the case in *Bickerstaff II*, and that SunTrust failed to comply with its own contractual requirements for compelling arbitration. We disagree.

"This Court reviews the grant or denial of a motion to compel arbitration de novo to see if the trial court's decision is correct as a matter of law; but we defer to the trial court's factual findings unless they are clearly erroneous." *Smith v. Adventure Air Sports Kennesaw, LLC*, 357 Ga. App. 1, 1 (849 SE2d 738) (2020) (citations and punctuation omitted).

So viewed, the record shows that when Jeff Bickerstaff opened his account with SunTrust in 2009, SunTrust's Rules and Regulations for Deposit Accounts did not permit depositors to opt out of arbitration.[5] On June 1, 2010, SunTrust revised the deposit agreement to allow then-existing depositors to opt out of arbitration by October 1, 2010, or within 45 days of opening their account, whichever was later. Bickerstaff first argues SunTrust waived all of its arbitration arguments by failing to raise them in *Bickerstaff II*. In *Bickerstaff III*, this Court determined the issue of whether SunTrust waived a right to compel arbitration against putative class members other than Bickerstaff had not been ruled on. See *Bickerstaff III*, 340 Ga. App. at 44. Here, Bickerstaff argues this case is like *Pinkerton & Laws Co. v. Robert & Co. Assoc.*, 129 Ga. App. 881 (201 SE2d 654) (1973). In *Pinkerton*, this Court held a party was barred from arguing an indemnity agreement was invalid on another

[5] The October 2009 version of the Deposit Agreement contained a limited optout provision permitting new depositors to reject arbitration within 45 days of opening their account, but no individuals who otherwise met the class definition opted out of arbitration in that period.

ground than was argued and decided in the prior appeal. 129 Ga. App. at 882 (1). *Pinkerton* is distinguishable from this case because the issue of whether SunTrust waived its right to compel arbitration against members other than Bickerstaff had never been ruled on by the trial court and thus could not have been argued on appeal. See *CDP Event Svcs., Inc. v. Atcheson*, 289 Ga. App. 183, 187 (2) (656 SE2d 537) (2008) (explaining that "where the trial court has not ruled on an issue, we will not address it").

Next, Bickerstaff argues the trial court's ruling violated the law of the case as established in *Bickerstaff II*. Bickerstaff argues the putative class members the Supreme Court discussed in *Bickerstaff II* included depositors who closed their accounts before June 1, 2010. This argument is unpersuasive. The trial court, in granting SunTrust's motion to compel, determined "[d]epositors who closed their accounts prior to June 1, 2010 never had the contractual right to opt out of arbitration." The Supreme Court's ruling in *Bickerstaff II* explicitly stated Bickerstaff's complaint tolled the time for "existing depositors" to opt out of arbitration. See *Bickerstaff II*, 299 Ga. at 469 (2). The record shows depositors who closed their account before June 1, 2010, never had the contractual right to opt out of arbitration. Depositors who closed their account before June 1, 2010, could not have been "existing depositors" when Bickerstaff filed his complaint. Therefore, we cannot say as a matter of law, the trial court erred in compelling depositors who closed their accounts prior to June 1, 2010, to arbitration.

Lastly, Bickerstaff argues SunTrust failed to comply with its own Deposit Agreement by failing to demand Bickerstaff's claim be submitted to arbitration within 90

days of his amended complaint. We disagree. Bickerstaff concedes the Deposit Agreement states "[a] demand that a Claim be submitted to arbitration may be made before the initiation of any legal proceeding or within ninety (90) days following the service of a new or amended complaint." Bickerstaff filed his complaint on July 12, 2010, and SunTrust answered and moved the trial court to order Bickerstaff to arbitration within the 90 day period. Therefore, we see no error in the trial court's ruling compelling arbitration for this group of depositors.

10. *Conclusion*

In conclusion, we affirm the trial court's ruling: 1) denying SunTrust's motion to dismiss for insufficient service of process; 2) denying SunTrust's motion to compel arbitration for class members who opened their account or were first charged an overdraft fee after July 12, 2010, and class members subject to different arbitration agreements than Bickerstaff; 3) concluding SunTrust's overdraft program constituted an advance of funds; 4) concluding that the question of whether overdraft fees constituted interest was a question of fact for the jury to determine; 5) denying SunTrust's summary judgment and determining intent was a question to be determined by the jury; 6) clarifying the class definition by inserting a continuous-citizenship requirement; and 7) compelling depositors who closed their accounts prior to June 1, 2010, to arbitration.

We reverse the trial court's ruling: 1) denying SunTrust's summary judgment as to claims that arose after the 2014 amendment to Georgia's usury law and 2) concluding the one-year limitation period for usury applied to Bickerstaff's common law claims for conversion

and money had and received.

Judgment affirmed in part; reversed in part. Dillard, P. J., and Brown, J., concur.

APPENDIX C

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CHARLES DANIEL BICKERSTAFF, as administrator of the Estate of JEFF BICKERSTAFF, JR., on behalf of himself and others similarly situated, Plaintiff, vs. SUNTRUST BANK, Defendant.	CIVIL ACTION FILE NO.: 10EV010485

OMNIBUS ORDER

This case is before the Court on the following motions:[1]

I. SunTrust's Motion to Dismiss for Insufficiency of Service;

II. Motion to Compel Arbitration;

III. Motion to Modify Class Definition;

IV. Motion for Summary Judgment;

V. Motions and Requests for Leave to File Under Seal; and

VI. Motion to Modify Scheduling Order.

Having reviewed and considered the Motions, supporting materials, pleadings and evidence of record, applicable

[1] The Court will enter a separate order on SunTrust's Motion to Exclude Experts and Plaintiff's Motion to Exclude in Part SunTrust's Experts.

law, and oral argument of counsel, the Court finds as follows:

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The parties to this class action case have a decades-long history of litigation. The facts and background of this case have been summarized numerous times and the Court incorporates the summaries by reference to the Court's previous Orders and Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787 (2016) (Bickerstaff II), Bickerstaff v. SunTrust Bank, 340 Ga. App. 43, 796 S.E.2d 9 (2017) (adopting Bickerstaff II and declining to address "the issue of whether SunTrust waived a right to compel arbitration against putative class members other than Bickerstaff"), and SunTrust Bank v. Bickerstaff, 349 Ga. App. 794, 824 S.E.2d 717 (2019) (Bickerstaff III).

On February 2, 2009, Jeff Bickerstaff, Jr. opened a personal checking account with SunTrust "thereby agreeing to the terms of SunTrust's deposit agreement…." Bickerstaff II, 299 Ga. at 459; Bickerstaff III, 349 Ga. App. at 795; Triplett Aff. ¶ 4; Triplett Depo. 11:6-10; 20:11-16.

Overdraft Coverage: "Like many banking institutions, SunTrust provides an automated overdraft program that allows an account holder's ATM or debit card transaction to be approved even if the approved amount exceeds the account holder's available balance." Bickerstaff III, 349 Ga. App. at 794. Under the deposit agreement, SunTrust was not obligated to authorize such a transaction. Maher Aff. ¶¶ 5-6; Def. Stmt. of Undisp. Mat. Facts (SUMF) ¶ 3; Pl. Resp. to Def. SUMF ¶ 3.

> If a debit card or ATM transaction was previously authorized, SunTrust was required to honor the transaction at the time it was submitted for settlement and posted to the depositor's account, which could be days later. If there were not sufficient funds to cover the transaction at the time it posted to the depositor's account, an overdraft would occur resulting in a negative account balance and, unless waived, a flat overdraft fee was assessed. SunTrust did not know in advance of posting whether a depositor would deposit sufficient funds or have other credits coming into the account to avoid or limit the amount of an overdraft. Likewise, if an overdraft occurred, SunTrust did not know when a depositor would deposit sufficient funds or have other credits coming into the account to bring the account to a positive balance.

Maher Aff. ¶ 7. The Class argues a negative account balance "resulting from an overdraft was, in fact, a loan, an extension of credit, or an advance of money from SunTrust to or on behalf of the depositor." Pl. Resp. to Def. SUMF ¶ 4.

Under the Deposit Agreement,

> [a]ny items against insufficient funds were subject to a penalty, also referred to as a fee. The amount of the fee was flat and fixed by SunTrust's publicly-posted fee schedule. The fee did not vary according to the amount of the overdraft or the length of time the account balance remained negative. If an account balance remained negative for a certain period of time (either five

> consecutive business days or seven calendar days at different points during the Class Period), the account holder would be charged a flat extended overdraft fee. Account holders were not charged more than one extended overdraft fee no matter how long their balance remained negative.

Maher Aff. ¶ 11; Pl. Resp. to Def. SUMF ¶¶ 12-14. During the Class Period, SunTrust charged an overdraft fee that ranged from $32 to $36. Maher Aff. ¶ 14; Stip. Rel. to Class Cert. ¶ 5 (Dec. 19, 2012); Pl. Resp. to Def. SUMF ¶ 19. During the time his account was open, Bickerstaff used his overdraft coverage and incurred more than $1,800 in overdraft fees on his account. Ans. ¶¶ 91, 93; Key Aff. ¶ 19; Pl. Resp. to Def. SUMF ¶ 73. SunTrust refunded $1,044 in overdraft fees to Bickerstaff. Key Aff. ¶ 19; Pl. Resp. to Def. SUMF ¶ 74. Bickerstaff closed his SunTrust account on October 22, 2013. Key Aff. ¶ 21; Pl. Resp. to Def. SUMF ¶ 78.

Arbitration Agreement: "At the time Bickerstaff opened his account, thereby agreeing to the terms of SunTrust's deposit agreement, that agreement included a mandatory arbitration provision." Bickerstaff II, 299 Ga. at 459. The original mandatory arbitration provision was contained in SunTrust's Rules and Regulations for Deposit Accounts along with a "class-action waiver." Bickerstaff III, 349 Ga. App. at 795-797. SunTrust unilaterally changed the Rules and Regulations on two pertinent occasions after Bickerstaff opened his account.

First, on October 1, 2009, SunTrust changed the Rules and Regulations to include a provision allowing new customers to reject and opt out of the arbitration agreement. Triplett Aff. ¶ 6, Ex. C at 22-23; Triplett Depo.

pp. 17-18. SunTrust did not provide Bickerstaff or any of its other existing customers with any notice of this change to the Rules and Regulations. Triplett Depo. pp. 42-43; Bickerstaff II, 299 Ga. at 460.

Second, on June 1, 2010, SunTrust changed the opt-out provision to extend the right to reject and opt out of the arbitration agreement to existing customers. Triplett Aff. ¶ 6; Triplett Depo. pp. 17-18. It was only "by language printed in monthly account statements distributed on August 24, 2010, that an updated version of the deposit agreement had been adopted, that a copy of the new agreement could be obtained at any branch office or online, and that all future transactions would be governed by the updated agreement." Bickerstaff II, 299 Ga. at 460.

Complaint: Bickerstaff filed his original Complaint on July 12, 2010 against SunTrust on behalf of himself and all other similarly situated alleging the SunTrust's overdraft fees amount to interest charges that exceed Georgia's civil and criminal usury limits. Bickerstaff II, 299 Ga. at 459; Compl. ¶¶ 14, 85-100. Bickerstaff asserts claims for: (1) violation of Georgia's civil usury laws, O.C.G.A. § 7-4-2; (2) violation of Georgia's criminal usury laws, O.C.G.A. § 7-4-18; (3) conversion; and (4) money had and received. First Am. Compl. ¶¶ 16, 87-119.[2]

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[2] Jeff Bickerstaff, Jr. passed away on November 14, 2014. Not. of Sub. (Mar. 16, 2017). On Dec. 10, 2015, the Supreme Court of Georgia corrected the style of the case to read as follows: Ellen Rambo Bickerstaff v. SunTrust Bank. On March 20, 2023, the Court entered an Order Substituting Charles Daniel Bickerstaff as Plaintiff and as Class Representative and the case was styled as: Charles Daniel Bickerstaff, as Administrator of the Estate of Jeff Bickerstaff, Jr., on behalf of himself and others similarly situated, Plaintiff v. SunTrust Bank, Defendant.

Bickerstaff served SunTrust on July 14, 2010 and filed the Affidavit of Service on July 21, 2011. Bickerstaff filed his First Amended Complaint on August 9, 2010. SunTrust filed its Answer on September 13, 2010 and its Motion to Compel Arbitration and Stay Action on October 4, 2010. SunTrust's Answer asserts that Bickerstaff and the putative class members' claims "are subject to a valid and enforceable arbitration agreement." Ans. ¶ 21.

Default: On May 6, 2011, SunTrust paid to open default and on May 9, 2011, filed its Verified Answer to Plaintiff's Original Complaint and Motion for Declaration That It Is Not in Default or, in the Alternative, to Open Default. SunTrust argued that the parties stipulated SunTrust would answer Bickerstaff's amended complaint on or before September 13, 2010 and because SunTrust did so, the case did not fall into default. SunTrust also raised the argument that it could not be in default "because the summons served on SunTrust with the original complaint was not signed by the Clerk of Court." Br. on Mot. for Decl. p. 2. SunTrust moved the Court to "either declare that SunTrust is not in default or exercise its broad discretion to open default." Id.

Ultimately, the Court ruled that SunTrust was not in default, and alternately, that SunTrust met the preconditions for opening default and default should be opened. Order Grant. Mot. for Decl. p.3 (July 11, 2011). Thus, the Court did not rule on SunTrust's argument that it cannot be found in default because no jurisdiction over it was acquired because the summons failed to bear the actual signature of the Clerk of Court. Id. n. 1.

First Motion to Compel Arbitration: SunTrust's first Motion to Compel Arbitration argued that Bickerstaff's

failure to send in the written notice specified in the June 1, 2010 opt-out provision rejecting arbitration required the Court to stay this action and compel Bickerstaff to submit his claims to arbitration. The parties litigated SunTrust's Motion to Compel Arbitration for almost a year and a half. The Court held that although SunTrust's arbitration agreement was not unconscionable under Georgia law, arbitration should not be compelled because Bickerstaff effectively exercised his right to opt out of arbitration by filing this suit. Order Deny. Def. Mot. to Compel (Mar. 16, 2012). The interlocutory appeals of the Order were dismissed as improvidently granted and litigation proceeded to the class certification stage (A12A2547, A12A2548).

Class Certification: On December 19, 2012, the parties entered into a Scheduling Order which included a Stipulation Related to Class Certification. SunTrust stipulated in part, for the purposes of class certification proceedings only, that it would not argue: (1) "that systems or processes used to record an Overdraft and asses an Overdraft Fee during the Class Period differ materially from customer to customer"; and (2) "[a]n Overdraft Fee is accounted for as fee income to SunTrust on the day that the Overdraft Fee is charged to an individual's consumer deposit account…." Stip. Rel. to Class Cert. ¶¶ 4, 6.

On April 8, 2013, Bickerstaff filed his Motion for Class Certification moving for class certification pursuant to O.C.G.A. § 9-11-23 seeking certification of the class:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to the date the Court certifies the class,

> (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees.
>
> Simply put, plaintiff proposes to represent a Georgia class of SunTrust depositors who paid overdraft charges on overdrafts of $500 or less during the class period and have not received a refund.

Mot. for Class Cert. p. 6. On May 20, 2013, SunTrust filed its Response to Plaintiff's Motion for Class Certification and its Motion to Compel Arbitration of Claims of Class Members.

> SunTrust opposed class certification, arguing, in relevant part, that (1) the class-action waiver in the Rules and Regulations precluded certification; (2) Bickerstaff could not opt out of the arbitration agreement on behalf of the class; and (3) Bickerstaff could not satisfy the numerosity, commonality, typicality, and adequacy of representation requirements for class certification under OGCA § 9-11-23. In reply, Bickerstaff asserted, among other arguments, that the class-action waiver was unconscionable, and, alternatively, was unenforceable as a matter of law because it was a non-severable part of the unenforceable jury trial waiver.

Bickerstaff III, 349 Ga. App. at 797. On February 19, 2014, the Court denied Bickerstaff's Motion for Class Certification and denied SunTrust's Motion to Compel

Arbitration. The Court of Appeals affirmed in Bickerstaff v. SunTrust Bank, 332 Ga. App. 121, 770 S.E.2d 903 (2015) (Bickerstaff I). Subsequently, the Supreme Court Bickerstaff II reversed and remanded the case for further proceedings holding that:

> the terms of the arbitration rejection provision of SunTrust's deposit agreement do not prevent Bickerstaff's class action complaint from tolling the contractual limitation for rejecting that provision on behalf of all putative class members until such time as the class may be certified and each member makes the election to opt out or remain in the class. Accordingly, the numerosity requirement of OCGA § 9-11-23 (a) (1) for pursuing a class complaint is not defeated on this ground.

Bickerstaff II, 299 Ga. at 470. Then, the Court of Appeals remanded the case to this Court, in part, to rule on class certification and "whether SunTrust waived a right to compel arbitration against putative class members other than Bickerstaff." Bickerstaff, 340 Ga. App. at 44.

On October 6, 2017, the Court entered its Order Granting Plaintiff's Motion for Class Certification holding that the purported class met the requirements of O.C.G.A. § 9-11-23(a), (b) and that the Litigation Class Action Waiver was unconscionable under Georgia law and therefore unenforceable. Accordingly, the Court certified the class as follows:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an

> ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

Bickerstaff III, 349 Ga. App. at 798-99. Bickerstaff III affirmed the Court's ruling and held in part that the class-action waiver is unenforceable as a matter of law because "the class-action waiver is not severable because it was a part of a single integrated provision." Id. at 805. Bickerstaff III also affirmed the class certification, finding this Court did not abuse its discretion. Id. at 799. Although Bickerstaff III did not reach the merits of the claims of the certified class, or the class's scope, it did address the class action waiver that SunTrust now attempts to relitigate.

On reconsideration, SunTrust contended the class action waiver should be severed. The Court of Appeals found SunTrust waived this argument. Id. at 804. Notably, when the Court of Appeals reached this decision, the Class had already been certified.

Upon remand, SunTrust again moved to modify the class definition pursuant to O.C.G.A. § 9-1-23(c)(1) as follows: (1) begin the class period on June 12, 2009 (rather than July 12, 2006) because of the one-year statute of limitations governing usury claims; (2) end the class period on July 12, 2010 or July 1, 2011; and (3) to exclude individuals who closed their SunTrust accounts prior to June 2010 or opened their accounts after March 2013. In response, the Class filed its Motion to Defer Response to and Ruling on Defendant's Motion to Modify the Class Definition, arguing in part that the Court should defer ruling on SunTrust's Motion at the merits stage of the

case.

On February 9, 2021, the Court entered its Order Denying Defendant's Motion to Modify the Class Definition and Denying Motion to Compel Arbitration. The Court held that SunTrust's arguments were indeed merit-based and declined to consider those arguments until after merits-based discovery concluded, including whether the Court should modify the Class. Similarly, the Court denied SunTrust's renewed Motion to Compel Arbitration at that stage of litigation.

Subsequently, the parties engaged in years of intensive and voluminous merits-based discovery. The Court issued several orders on electronically stored information and account data discovery. The parties engaged an outside vendor, Ankura Consulting Services, LLC, in part, to identify accountholders who may have met the Class Definition. On April 7, 2022, the Court entered its Order Approving and Directing Issuance of Class Notice pursuant to O.C.G.A. § 9-11-23(c)(2): (1) appointing American Legal Claim Services, LLC to administer class notice in this case; (2) approving of the manner, form, and content of the notice provided by Plaintiff's Class Notice Plan; and (3) directing the Class Administrator "to issue class notice and to proceed with the Class Notice Plan, including by mailing the short-form postcard notices within thirty (30) days of the date of entry of his Order."

On July 5, 2022, SunTrust filed its Renewed Motion to Compel Arbitration Against Certain Class Members arguing again that the following class members' claims were compelled to arbitrate and should be excluded from the Class: (1) class members who closed their account

prior to June 2010; (2) class members who opened their account or were first charged overdraft fees after July 12, 2010; and (3) class members who opened their account or were first charged overdraft fees on or after March 1, 2013. The parties continued with their exhaustive and voluminous discovery. Notably, given the volume of documents, remaining discovery schedule, the length of time the case had been pending, SunTrust's advice of counsel defense, and numerous privilege issues, the Court appointed Susan Kennicott as Special Master. Order App. Sp. Master (Apr. 13, 2023).

Pursuant to the relevant scheduling orders and the close of discovery, the parties filed their many dispositive and Rule 702 motions. The Court considered volumes of briefing and exhibits and heard lengthy oral arguments on the pending motions.

ANALYSIS

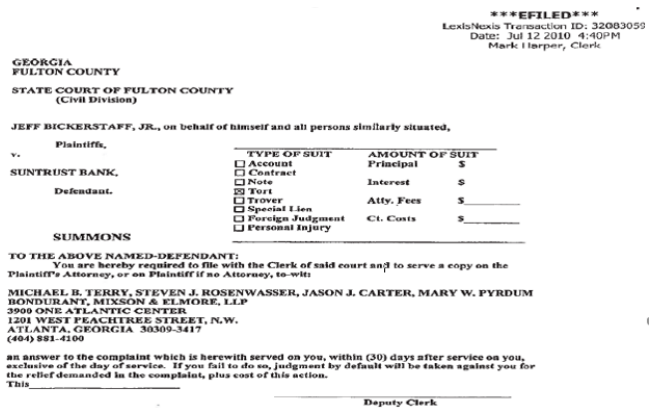
I. SunTrust's Motion to Dismiss on Insufficiency of Process Defense is DENIED

Bickerstaff served SunTrust on July 14, 2010 and filed the Affidavit of Service on July 21, 2011. Bickerstaff filed his First Amended Complaint on August 9, 2010. SunTrust filed its Answer on September 13, 2010. On May 6, 2011, SunTrust paid to open default and the next business day, on May 9, 2011, filed its Verified Answer to Plaintiff's Original Complaint and Motion for Declaration That It Is Not in Default or, in the Alternative, to Open Default. SunTrust argued that the parties stipulated SunTrust would answer Bickerstaff's amended complaint on or before September 13, 2010 and because SunTrust did so, the case did not fall into default. SunTrust also raised the argument that it could not be in default

"because the summons served on SunTrust with the original complaint was not signed by the Clerk of Court." Br. on Mot. for Decl. p. 2. SunTrust moved the Court to "either declare that SunTrust is not in default or exercise its broad discretion to open default." Id.

Ultimately, the Court ruled that SunTrust was not in default, and alternately, that SunTrust met the preconditions for opening default and default should be opened because, in part, "whenever possible, cases should be decided on their merits, for default judgment is not favored in law." Utilicom Supply Assocs. v. Terra Tech, Inc., 360 Ga. App. 509, 512, 861 S.E.2d 449 (2021); Order Grant. Mot. for Decl. p. 3 (July 11, 2011). The Court did not rule on SunTrust's argument that it cannot be found in default because no jurisdiction over it was acquired because the summons failed to bear the actual signature of the Clerk of Court. Id. n. 1.

Once again, SunTrust moves to dismiss Plaintiff's Complaint pursuant to O.C.G.A. §§ 9-11-4(b) and 9-11-12(d) for insufficiency of process: "Plaintiff failed to serve it with a valid summons executed by the Clerk of Court and has been on notice of this fatal service defect since SunTrust Bank's answer was filed in 2010." Br. on Mot. to Dism. p. 1. Particularly, SunTrust argues that the summons served on SunTrust did not contain a signature of the Clerk of Court or deputy clerk. However, the summons is stamped "Efiled", dated July 12, 2010 and bears the name of Mark Harper, Clerk. That was sufficient under the Court's E-filing rules to satisfy the summons requirement.



EFILED
LexisNexis Transaction ID: 32083059
Date: Jul 12 2010 4:40PM
Mark Harper, Clerk

GEORGIA
FULTON COUNTY

STATE COURT OF FULTON COUNTY
(Civil Division)

JEFF BICKERSTAFF, JR., on behalf of himself and all persons similarly situated,

Plaintiffs,

v.

SUNTRUST BANK,

Defendant.

TYPE OF SUIT
☐ Account
☐ Contract
☐ Note
☒ Tort
☐ Trover
☐ Special Lien
☐ Foreign Judgment
☐ Personal Injury

AMOUNT OF SUIT
Principal $
Interest $
Atty. Fees $
Ct. Costs $

SUMMONS

TO THE ABOVE NAMED-DEFENDANT:
You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

MICHAEL B. TERRY, STEVEN J. ROSENWASSER, JASON J. CARTER, MARY W. PYRDUM
BONDURANT, MIXSON & ELMORE, LLP
3900 ONE ATLANTIC CENTER
1201 WEST PEACHTREE STREET, N.W.
ATLANTA, GEORGIA 30309-3417
(404) 881-4100

an answer to the complaint which is herewith served on you, within (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action.
This_____

Deputy Clerk

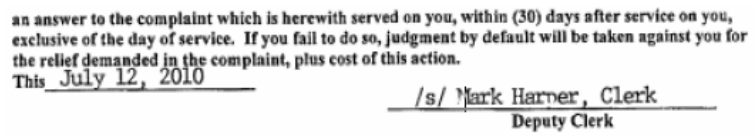
O.C.G.A. § 9-11-4(a) requires that "[u]pon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service." "The summons shall be signed by the clerk…." O.C.G.A. § 9-11-4(b). "The issuance of a summons signed by the clerk is a necessary part of acquisition of jurisdiction." Diaz v. First Nat'l Bank, 144 Ga. App. 582, 583, 241 S.E.2d 467 (1978). Pursuant to the newly-established E-filing rules at the time of Bickerstaff's initiation of this case, the summons was deemed to be signed electronically by the Clerk when electronically filed. State Ct. of Fulton Co. Local E-Filing R. 2-106.[3] Counsel for SunTrust admits SunTrust was served with a copy of the original Complaint. SunTrust answered the Complaint pursuant to the parties' stipulation. Significantly, SunTrust actively participated in this litigation for the past fourteen years. SunTrust submitted to jurisdiction when it moved to compel arbitration. E.g., Mincey v. Stamper, 253 Ga. 301, 304, 253

[3] Every pleading, document, and instrument electronically filed or served shall be deemed to have been signed by the Judge, **clerk**, attorney or declarant and shall bear the typed name, address, telephone number, and Bar number of a signing attorney." (emphasis provided).

S.E.2d 857 (1984); Tyree v. Jackson, 226 Ga. 690, 693, 177 S.E.2d 160 (1970) (discussing the purpose of process and service and holding "where it is clear that the defendant has been served, has appeared and has been heard on the merits of the controversy, the proceeding should not be vitiated by objections going merely to the form of process.") Accordingly,

IT IS HEREBY ORDERED that SunTrust's Motion to Dismiss on Insufficiency of Process Defense is **DENIED**.

On July 26, 2013, Plaintiff filed a Motion for Leave to Amend Summons and contemporaneously served three amended summonses on SunTrust's counsel and registered agent bearing electronic signatures. The first was an Amended Summons that changed the original summons by adding the electronic signature of Mark Harper, Clerk and dated July 12, 2010:



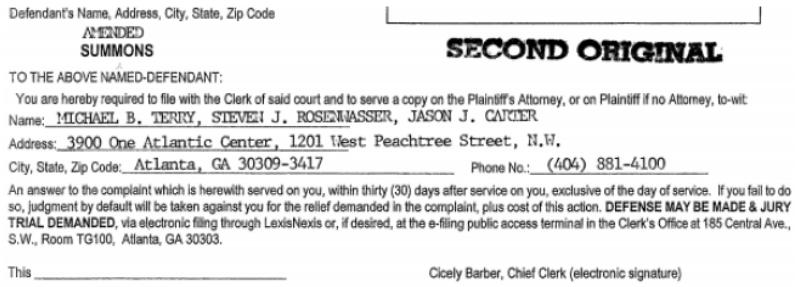
an answer to the complaint which is herewith served on you, within (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action.

This July 12, 2010

/s/ Mark Harper, Clerk

Deputy Clerk

The second and third summonses were the then-current E-Filing Summonses, with the electronic signature of the then-current Chief Clerk, Cicely Barber:



Defendant's Name, Address, City, State, Zip Code

AMENDED

SUMMONS

SECOND ORIGINAL

TO THE ABOVE NAMED-DEFENDANT:

You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

Name: MICHAEL B. TERRY, STEVEN J. ROSENWASSER, JASON J. CARTER

Address: 3900 One Atlantic Center, 1201 West Peachtree Street, N.W.

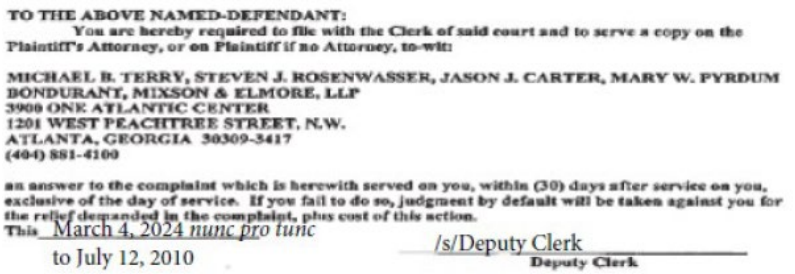
City, State, Zip Code: Atlanta, GA 30309-3417 Phone No.: (404) 881-4100

An answer to the complaint which is herewith served on you, within thirty (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action. **DEFENSE MAY BE MADE & JURY TRIAL DEMANDED**, via electronic filing through LexisNexis or, if desired, at the e-filing public access terminal in the Clerk's Office at 185 Central Ave., S.W., Room TG100, Atlanta, GA 30303.

This _____ Cicely Barber, Chief Clerk (electronic signature)

Pl. Mot. for Leave to File Am. Summs. Ex. 2. Having considered Plaintiff's Motion for Leave to Amend Summons, briefing, evidence of record, and applicable law,

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to Amend Summons is **GRANTED**.[4] Nazli v. Scott, 203 Ga. App. 523, 525, 417 S.E.2d 187 (1992) ("[I]t is well-established that process or proof of service thereof may be amended in the trial court's discretion and upon such terms as the trial court deems just.") (citing O.C.G.A. § 9-11-4(h), (i); punctuation omitted). The Summons stamped by Mark Harper, Clerk dated July 12, 2010 and served on SunTrust on July 14, 2010, is amended to bear the electronic signature of the Clerk of Court *nunc pro tunc* to July 12, 2010:



TO THE ABOVE NAMED-DEFENDANT:
You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

MICHAEL B. TERRY, STEVEN J. ROSENWASSER, JASON J. CARTER, MARY W. PYRDUM
BONDURANT, MIXSON & ELMORE, LLP
3900 ONE ATLANTIC CENTER
1201 WEST PEACHTREE STREET, N.W.
ATLANTA, GEORGIA 30309-3417
(404) 881-4100

an answer to the complaint which is herewith served on you, within (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action.

This March 4, 2024 *nunc pro tunc* to July 12, 2010

/s/Deputy Clerk
Deputy Clerk

Compare Nazli, 203 Ga. App. at 525 (affirming the granting of the motion to dismiss, in part, because "appellee did not seek to amend or correct the deficiency by serving [the defendant] personally at any time before the trial court ruled on appellants' motion to dismiss….")

II. SunTrust's Motion to Compel Arbitration is GRANTED IN PART AND DENIED IN PART

Discovery is complete and the merits are now fully

[4] SunTrust's claims of prejudice are unavailing, especially given the holdings of Bickerstaff II and Bickerstaff III.

developed; thus, it is ripe to decide SunTrust's Third Motion to Compel Arbitration. The Court repeatedly declined to address the substantive arguments until after class notification. E.g., Order Deny. Def.'s Mot. to Mod. The Class Def. and Deny. Mot. to Compel Arb. (Feb. 9, 2021).

After considering the arguments raised, the Court hereby **GRANTS IN PART AND DENIES IN PART** SunTrust's motion, finding that the appellate courts already decided most of the issues, and this Court is bound by those decisions.

"Under the 'law of the case' doctrine, any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be." Southern States Chemical v. Tampa Tank & Welding, Inc., 316 Ga. 701, 716, 888 S.E.2d 553 (2023) (punctuation omitted); O.C.G.A. § 9-11-60(h). This Court is bound by Bickerstaff II and Bickerstaff III and is precluded by the law of the case from revisiting those prior holdings.

The law of the case doctrine "applies despite contentions that a ruling below is erroneous." Id. at 717 (citing Security Life Ins. Co. of America v. Clark, 273 Ga. 44, 46, 535 S.E.2d 234 (2000) ("[A]ppellate rulings remain binding as between parties to a case, so long as the evidentiary posture of the case remains unchanged, despite all contentions that prior rulings in the matter are erroneous.")). "But the mere fact that the evidentiary posture changed does not necessarily render the law of the case rule inapplicable. Instead, to determine if the rule applies here, we must ask whether the new evidence

requires a different conclusion…." Carson v. Brown, 366 Ga. App. 674, 683, 883 S.E.2d 908 (2023) (citation omitted). There has been no new evidence presented after the appellate courts rendered their decisions. The deposit agreements SunTrust now argues bar some of these claims are not new evidence; they existed during this case's multiple trips to the appellate courts.

SunTrust modified the arbitration provisions in the Deposit Agreements after Bickerstaff filed this lawsuit. SunTrust argues these changes made it impossible for Bickerstaff to opt out of arbitration through the filing of this lawsuit because some class members never had a right to opt out of the arbitration agreement that could have been exercised at the time Bickerstaff filed his complaint.[5] SunTrust contends only individuals who were putative members of the class when the lawsuit was filed are deemed to have opted out of arbitration. This argument is barred by the law of the case rule and the Supreme Court's decision in Bickerstaff II, which addressed whether Bickerstaff could reject arbitration on behalf of the yet-to-be certified class.[6]

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[5] SunTrust modified its deposit agreements numerous times since the filing of this lawsuit: June 1, 2010, July 2011, November 2011, September 2014. After this lawsuit was filed, each subsequent version contained a provision granting depositors the right to reject arbitration.

[6] The Court certified the class on October 6, 2017. In the Court's February 9, 2021 Order Denying Defendant's Motion to Modify the Class Definition and Denying Motion to Compel Arbitration the Court acknowledged that "when issuing its certification order, mistakenly overlooked Bickerstaff's admission [that those with no overdraft after July 1, 2011, are not in the class], and adopted Bickerstaff's initial proposed class definition, rather than the more limited class." The Class acknowledges that it previously agreed with SunTrust's

In Bickerstaff II, the Supreme Court did not rule on the scope of the putative class, although it referenced Bickerstaff's proposed definition:

> On April 13, 2013, Bickerstaff moved to certify a class of all Georgia citizens with a SunTrust deposit agreement who, from a date four years prior to the date Bickerstaff filed his complaint, had at least one overdraft of $500 or less resulting from an ATM or debit card transaction and paid an overdraft fee on that transaction.

In holding that Bickerstaff's filing of the lawsuit tolled the time that putative class members were required to notify SunTrust of their intent to reject arbitration, the Supreme Court rejected the same arguments SunTrust now makes in support of its argument to compel arbitration for these certain subclasses of depositors: "[W]e are unconvinced by SunTrust's argument that a contractual deadline requiring individual action may not be suspended until the certification of a class (and the attendant opportunity of class members to opt out or remain bound by the result of the class action) . . ." Id. at 464. Thus, depositors' deadlines to provide notice to opt out of arbitration (generally 45 days from the opening of an account) were

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position taken in opposition to class certification: "SunTrust argues that those with no overdraft before July 1, 2011 are not in the class. We agree." Pl.'s Suppl. Br. Class Certification, at 13, 15 n. 9. Even if this Court were to find this was an admission, the Class has since taken the position that Bickerstaff had the ability, based on Bickerstaff II, to opt out of arbitration for all class members. Because the arbitration clauses at issue were modified well before Bickerstaff II, this Court must assume they were before the Supreme Court when it made its decision on the ability of Bickerstaff to opt out of arbitration on behalf of the putative class.

suspended between the time the lawsuit was filed and the class was certified.

> The determinative issue is whether the filing of Bickerstaff's complaint, thereby signaling his rejection of the arbitration agreement, tolled the time in which the putative class members were required to notify SunTrust of their intent to reject arbitration. The answer is yes.

Id. at 463. The Supreme Court reasoned that upon class certification and notification, class members would have to decide for themselves whether to reject the deposit agreement's arbitration clause:

> [E]ach class member will be notified and required to decide whether to opt out of the lawsuit. See O.C.G.A. 9-11-23(c)(2). At that point, each notified depositor will be exercising his or her own contractual right to reject, or not, the deposit agreement's arbitration clause. Bickerstaff will not be making that decision for the other depositors and thus will not be acting as a party to those depositors' contracts or as a person in privity with the other depositors and will not be acting as a beneficiary of anyone else's deposit agreement. Any member of the certified class who remains but does not opt out of the class will be deemed to have brought suit at the same time Bickerstaff's complaint was filed, which was within the deadline for rejecting arbitration for existing depositors, the class Bickerstaff seeks to represent.

Id. at 496.

"The entire scheme of class actions, as set forth in O.C.G.A. § 9-11-23 is that all putative class members benefit from the class representative's filing of the complaint, just as if each member had filed the complaint himself or herself." Id. at 468. Even though SunTrust altered the arbitration provision in the deposit agreement multiple times between the filing of the lawsuit and the appeal to the Supreme Court, that Court did not limit its holding to those depositors whose arbitration provisions were identical to Bickerstaff's. Instead, Bickerstaff II held that his rejection of arbitration applied to all members of the putative class who chose to remain in the class:

> [I]n this case it is the class representative's timely notification of rejection of arbitration by filing the complaint that serves to toll the time for the remaining class members to give notice. And for those members who ratify the class, the complaint provides the necessary notice. It demonstrates the member's intent to sue SunTrust in a court of law and to reject the requirement to arbitrate the claim.

Id. at 470. This is the law of the case. E.g., Hicks v. McGee, 289 Ga. 573, 579, 713 S.E.2d 841, 845 (2011) (law of the case rule applies to actual decisions, not to issues raised by the parties but never ruled upon); O.C.G.A. §9-11-60(h).

SunTrust nonetheless argues that the Class should be modified to remove individuals whose claims are subject to arbitration. Particularly, SunTrust argues the following accountholders should be excluded: (a) accountholders who closed their SunTrust accounts

before June 1, 2010, when SunTrust amended its Deposit Agreement (because they never had a contractual right to opt out of arbitration); (b) accountholders who opened their account after July 12, 2010 because they had no contractual opt out right that Bickerstaff could have preserved; (c) accountholders who opened their accounts or were first charged overdraft fees on or after March 1, 2013 when SunTrust amended its arbitration provision to provide that depositors could not reject arbitration by filing a lawsuit; and (d) class members who were not part of the definition of the class that Bickerstaff sought to represent when the complaint was filed. For the reasons stated above, the Court finds that the Motion to Compel Arbitration is **DENIED** as to subcategories (b), (c) and (d).

As to the claims of depositors who closed their accounts before June 1, 2010, SunTrust argues that these depositors never had the right to reject arbitration. Bickerstaff's filing of the Complaint could not have tolled the period to exercise the right to arbitration when that right never existed for them.[7] The Court agrees. Bickerstaff II allowed Bickerstaff to exercise the contractual right to opt out of arbitration on behalf of other putative class members who also had a right to opt out of arbitration: "Bickerstaff's complaint serves only to toll the contractual period for making such an election." Id. at 466 (emphasis added). The Supreme Court also

[7] The October 2009 version of the Deposit Agreement contained a limited opt out provision permitting new depositors to reject arbitration within 45 days of opening their account, but no individuals who otherwise met the class definition opted out of arbitration in that period. Br. In Supp. of Its Third Mot. to Comp. Arb. p. 9 n.8; Hernandez Aff. ¶ 8.

referred to the rights of "existing depositors."[8] Depositors who closed their accounts prior to June 1, 2010 never had the contractual right to opt out of arbitration; thus, the Motion to Compel Arbitration is **GRANTED** as to depositors who closed their accounts before June 1, 2010.

III. SunTrust's Motion to Modify Class Definition is GRANTED IN PART

SunTrust has filed multiple motions to modify the Class. The Court repeatedly declined to address the substantive arguments until after class notification. E.g., Order Deny. Mot. to Mod. the Class Def. and Deny. Mot. to Compel Arb. (Feb. 9, 2021). SunTrust's request to modify the class definition is now ripe. On October 6, 2017, this Court certified the following class:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

SunTrust contends the Class must be modified to:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who from July 12, 2009 to July 12, 2010 (i) had at least one overdraft of $500.00 or less resulting from an

[8] Bickerstaff argues that SunTrust waived this right by never filing a Motion to Compel arbitration. However, SunTrust did not waive this right, and filed three Motions to Arbitrate.

> ATM or debit card transaction (the "Transaction"); paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees, but excluding those individuals whose accounts were closed prior to June 1, 2010.

After considering the arguments and the case law, this Court finds that modification of the class is not warranted, though clarification is. Many of the arguments made by SunTrust are substantive and are addressed elsewhere in this Order regarding the Motion for Summary Judgment or the Motion to Compel Arbitration.[9]

1. Class Action Waiver

SunTrust argues that certain groups of depositors should be removed from the class because the class action waiver that was addressed in Bickerstaff III was changed in subsequent deposit agreements. The following waivers in SunTrust Deposit Agreements are at issue:

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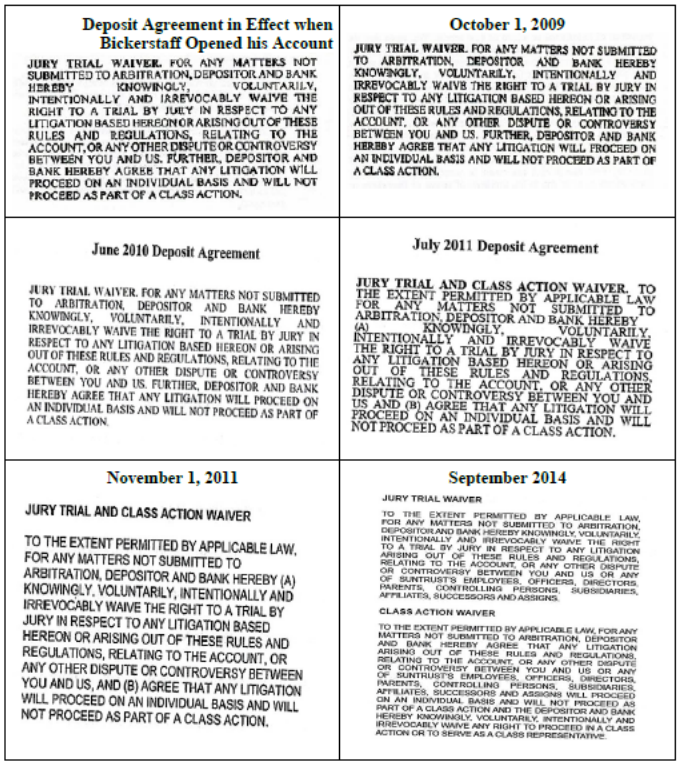
[9] SunTrust moves to modify the class definition to remove the following subcategories:

1. Class period should begin on July 12, 2009 - see section IV (4) infra.
2. Class period should end on July 12, 2010, or July 1, 2011, or February 19, 2014. See section II supra and Section IV (4) infra.
3. The same subgroups are addressed in the Motion to Compel Arbitration, see Section II supra.



Deposit Agreement in Effect when Bickerstaff Opened his Account

JURY TRIAL WAIVER. FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. FURTHER, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

October 1, 2009

JURY TRIAL WAIVER. FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. FURTHER, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

June 2010 Deposit Agreement

JURY TRIAL WAIVER. FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. FURTHER, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

July 2011 Deposit Agreement

JURY TRIAL AND CLASS ACTION WAIVER. TO THE EXTENT PERMITTED BY APPLICABLE LAW FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY (A) KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US AND (B) AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

November 1, 2011

JURY TRIAL AND CLASS ACTION WAIVER

TO THE EXTENT PERMITTED BY APPLICABLE LAW, FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY (A) KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US, AND (B) AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

September 2014

JURY TRIAL WAIVER

TO THE EXTENT PERMITTED BY APPLICABLE LAW, FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US OR ANY OF SUNTRUST'S EMPLOYEES, OFFICERS, DIRECTORS, PARENTS, CONTROLLING PERSONS, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS.

CLASS ACTION WAIVER

TO THE EXTENT PERMITTED BY APPLICABLE LAW, FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US OR ANY OF SUNTRUST'S EMPLOYEES, OFFICERS, DIRECTORS, PARENTS, CONTROLLING PERSONS, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION AND THE DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE ANY RIGHT TO PROCEED IN A CLASS ACTION OR TO SERVE AS A CLASS REPRESENTATIVE.

Triplett Aff. ¶¶ 5-8, Exs. A-D.

SunTrust now argues the Court should modify the class because subsequent class action waivers in Deposit Agreements have not been considered or resolved by this Court or any appellate court. But, Bickerstaff III went through detailed waiver analyses and held that "because the class-action waiver is a non-severable part of the unenforceable jury trial waiver provision, we agree with Bickerstaff that the class-action waiver is unenforceable as a matter of law" 349 Ga. App. at 800 (reaffirmed on motion for reconsideration). More specifically, the court stated:

> SunTrust's class-action waiver is not an independent provision. Rather it is a single sentence contained in the unenforceable jury trial waiver provision.
>
> * * *
>
> The severability clause, however, does not authorize SunTrust or the courts to excuse a single sentence (the class-action waiver) from a single integrated provision (the jury trial waiver).

Id. at 800.

The June 2010, July 2011, and November 2011 waivers contain virtually the same nonseverable class action waiver as considered in Bickerstaff III. There were formatting changes, but both the class action waiver and unenforceable jury trial waiver were still included in the same paragraph with the same typeface. The September 2014 changes were the first time SunTrust separated the class action waiver from the unenforceable jury trial waiver. Although these changes may have solved the concern that the "class action waiver was unenforceable as a matter of law because it was a non-severable, integrated part of the legally unenforceable jury trial waiver," id. at 722, the Court of Appeals ruled that SunTrust waived these arguments in this litigation.

Regardless, relitigation of this issue is barred by the law of the case rule. At the time the Court of Appeals decided Bickerstaff III, the Court already certified the class and the Deposit Agreement modifications now at issue had already been made. The issue of the enforceability of the class action waiver has already been decided and it is the law of the case. "The law of the case

doctrine applies only when the same issue has been actually litigated and decided." Hall v. Hill, 366 Ga. App. 285, 292, 882 S.E.2d 34 (2022) (citations omitted). The Court of Appeals already ruled on the severability of these clauses when it denied SunTrust's motion for reconsideration:

> SunTrust has moved for reconsideration of our decision, focusing on our ruling in Division 1, regarding the issue of severability of the class-action waiver from the legally unenforceable jury trial waiver. In its motion, SunTrust substantively argues for the first time in this Court that the class-action waiver is an additional independent promise that can be severed and stand alone based on the waiver's plain language. SunTrust did not raise this argument in its appellate brief or reply brief in this Court, nor did it cite a majority of the cases on which it now relies for its position. Furthermore, a review of the record confirms that it did not make this substantive argument in the trial court. Thus, SunTrust waived this argument.

Bickerstaff III, 349 Ga. App. at 804. Thus, based on the law of the case rule, the Court denies SunTrust's request to modify the Class based upon changes to the Class Action waiver.

2. Class members must be Georgia Citizens

It is undisputed the Class is limited to Georgia citizens and the parties do not argue against limiting the class to Georgia citizens, but they differ in the definition of who is a Georgia citizen for purposes of the class. SunTrust contends that Georgia citizens cannot be defined merely

as someone with a Georgia mailing address, as the Class now claims. In opposition, Bickerstaff argues that anyone with a Georgia mailing address during the class period is a Georgia citizen. Bickerstaff's position is contrary to the assertions made throughout this litigation - indeed, the positions upon which this Court relied in prior rulings.[10] Thus, the Court clarifies that Class members must have been continuous citizens of Georgia between the filing of the case (or the overdraft fee if that occurred before the filing) and the certification of the Class.

In support of its position that class members must be Georgia citizens, SunTrust directs the Court to Plaintiff's Reply in Support of His Motion for Class Certification in which Bickerstaff argued that SunTrust's possession of "data as to the customer's place of residence, including the address the customer used when the bank account was opened and the customer's current mailing address" as well as accountholders' taxpayer identification numbers, state driver's license or state-issued ID cards could determine residency and/or citizenship. Rep. in Supp. of Class Cert. pp. 32-34. Bickerstaff also offered that "if SunTrust's residency information is somehow insufficient to establish citizenship, the class is still ascertainable by, for example, comparing SunTrust's customer data to Georgia's voting records, which are ***conclusive*** evidence of citizenship." Id. at p. 33 (emphasis in original); p. 34 ("Thus, upon certification, Plaintiffs and any class

[10] See, e.g., Order Denying Leave to Intervene or in the Alternative Motion for Joinder as Co-Plaintiffs p. 4 (June 13, 2011) ("Here, the Buffingtons are unable to meet any of these requirements because, as residents of the State of Florida, they are admittedly not even members of the putative class in this case, which is limited to Georgia citizens.)

administrator could simply compare the list of SunTrust customers who were charged usurious interest to Georgia's voting records to determine which customers are Georgia citizens. The Georgia Court of Appeals has repeatedly found that class actions can be maintained and classes ascertained based upon similar analyses of publicly available databases.") (citations omitted). SunTrust argues that "Class counsel's proposed plan of action [to use voting records to determine which customers are Georgia citizens] was apparently sufficient [to the Court] to defeat SunTrust's objection that the class was not ascertainable, as the Court certified a class of 'Georgia citizens.'" Mot. to Mod. p. 34.

Throughout this litigation, and certainly in opposition to the motion to intervene, Bickerstaff took the position that class members had to be continuous citizens of the State of Georgia. Pl's Resp. to Mot. to Interv. p.2. Bickerstaff's First Amended Complaint proposed he represent all persons who meet the following definition ("Class Member"):

> a. Who was on the date Plaintiff filed this Complaint, and has thereafter **continuously remained through the date this Court certifies this action as a class action, a citizen of Georgia**; and
>
> b. To whom SunTrust in the administration of its Automated Overdraft Program made an advance of money in an amount less than $3,000; and
>
> c. From whom SunTrust collected such advance and one or more charges in connection with the advance, including, but not limited to, an Overdraft Fee and/or Extended Overdraft Fee,

> as applicable, within four years of the date Plaintiff filed this Complaint.

¶ 70 (emphasis supplied). Bickerstaff's Motion for Class Certification moved for certification of the following class:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to the date the Court certifies the class, (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees.
>
> Simply put, plaintiff proposes to represent a Georgia class of SunTrust depositors who paid overdraft charges on overdrafts of $500 or less during the class period and have not received a refund.

p. 6. Plaintiff's September 30, 2021 Reply in Support of Motion for Entry of Order Approving and Directing Issuance of Class Notice argued continuous citizenship is not required for Class Members. pp. 21-26. At the Class's behest, the Court directed notice be given "to individuals who ***may*** be Class Members, recognizing that whether those individuals are in fact Class Members will be adjudicated later, at the merits stage." Pl. Rep. in Supp. of Mot. for entry of Ord. App. and Direct. Iss. of Class Not. p. 8 (emphasis in original). The Court's April 7, 2022 Order Approving and Directing Issuance of Class Notice approved of the content of the Notice including: "To qualify as a 'Georgia citizen' for purposes of this definition, you must have been a Georgia citizen on July 12, 2010 and

on the date you paid an overdraft fee." This broader description includes depositors who have been citizens continuously of Georgia.

The Class's current position and interpretation should not and did not alter that requirement of continuous citizenship. Citizenship is not only a mailing address. An analysis of citizens for purposes of diversity jurisdiction is illustrative.

> Thus, there are two necessary inquiries regarding citizenship for diversity jurisdiction: (1) whether the person is a United States citizen, and (2) whether the person is domiciled in a particular state. Under the first inquiry, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. U.S. Const. Amend. XIV, § 1. Regarding the second inquiry, domicile – synonymous with "state citizenship" in diversity jurisprudence – generally requires two elements: (1) physical presence in a state and (2) the intent to make the state one's home.

Duff v. Beaty, 804 F. Supp. 332, 334 (N.D. Ga. 1992). A complaint merely alleging residency, as opposed to state citizenship or domicile, is insufficient to invoke diversity jurisdiction. Id. Domicile is not always the same as residence, as a person may reside in one place but be domiciled elsewhere. See Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d 29 (1989); Guideone Mut. Ins. Co. v. Daniel, No. 7:13-CV-126 (HL), 2013 U.S. Dist. LEXIS 137168, at *3-4 (M.D. Ga. Sep. 25, 2013). Plaintiff previously relied on the requirement of continuous Georgia citizenship to defeat

the interpleader action.

Class Members must be continuous citizens of Georgia, i.e. citizens of the United States and domiciled in Georgia, for the entire Class Period. The Court does not believe it is necessary to modify the class definition, because the Class Definition was not altered. To provide clarity the Class Definition hereby specifies what is required of citizenship :

> Every **person who was a Georgia citizen on the date Plaintiff filed this Complaint, and has thereafter continuously remained through October 6, 2017, a citizen of Georgia** who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

IT IS HEREBY ORDERED that SunTrust's Motion to Modify Class Definition is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that the Class's motion for its attorneys' fees and expenses for responding to SunTrust's Motion is **DENIED**.

IV. SunTrust's Motion for Summary Judgment

SunTrust argues that the "overwhelming consensus" of "every legal authority" has determined that overdraft fees are not interest on loans for purposes of usury laws. Br. in Supp. of Mot. for Summ. J. pp. 25-29. These decisions rely on federal law or the law of states other than

Georgia. This Court is bound by Georgia statutes and prior decisions of the Georgia appellate courts. Under Georgia law, whether the overdraft fees constitute usury are issues of fact to be decided by the jury.

1. Standard of Review

The Georgia Supreme Court, in Lau's Corp v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991), set forth the oft-quoted standard for summary judgment:

> To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact, and that the undisputed facts, viewed in a light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c). A *defendant* may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial. *See e.g., Holiday Inns, Inc. v. Newton*, 157 Ga. App. 436, 278 S.E.2d 85 (1981). A defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving

> party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. O.C.G.A. § 9-11-56(e).

Id. at 491. Even "slight evidence will be sufficient to satisfy the plaintiff's burden of production of some evidence on a motion for summary judgment." Clark v. City of Atlanta, 322 Ga. App. 151, 153-54, 744 S.E.2d 122 (2013).

2. Whether overdraft fees constitute interest is a question of material fact to be resolved by the jury

The initial question to be addressed is whether Georgia's usury laws apply to SunTrust's overdraft protection program. SunTrust argues that "[t]he national judicial consensus" and "numerous regulatory agencies, including the Georgia DBF, as well as nearly 20 federal and state courts through the country" determined that overdraft fees are not interest on loans for purposes of usury laws. Br. in Supp. of Mot. for Summ. J. pp. 25-26. None of this "overwhelming" judicial authority from jurisdictions outside Georgia interprets Georgia statutes or Georgia case law that this Court must consider. Upon a review of binding authorities on this Court, it is for the jury to determine whether SunTrust's overdraft fees violate Georgia's usury laws.

As a matter of law, Georgia's usury laws apply because SunTrust's overdraft program constitutes an advance of funds to its depositors.

a. SunTrust's overdraft protection falls within the statutory definition of a loan or advance.

Georgia's civil usury statute defines interest as "a charge for the use of money computed over the term of the contract at the rate stated in the contract or precomputed at a stated rate on the scheduled principal balance or computed in any other way or any other form." O.C.G.A. § 7-4-1 (a)(3). The statute further provides:

> Where the principal amount involved is $3,000.00 or less, such rate shall not exceed 16 percent per annum simple interest on any **loan, advance, or forbearance** to enforce the collection of any sum of money unless the **loan, advance, or forbearance** to enforce the collection of any sum of money is made pursuant to another law.

O.C.G.A. §7-4-2 (emphasis provided).[11]

SunTrust contends overdraft coverage is not a loan because overdraft fees do not bear the traditional hallmarks of loans because the depositors did not undergo credit checks or sign written loan documents. Rather, SunTrust contends an overdrawn checking account is "a temporary imbalance of debits and credits in a checking account that must be corrected." Br. in Supp. of Mot. for

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[11] The criminal usury statute's language is even broader applying to:

> any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than 5 percent per month, either directly or indirectly, by way of commission for advances, discount, exchange, or the purchase of salary or wages; by notarial or other fees; or by any contract, contrivance, or device whatsoever.

O.C.G.A. § 7-4-18 (emphasis supplied).

Summ. J. p. 27. SunTrust argues that because the fees are contingent, they are not loans - i.e. it depends "entirely on [the account holder's] decision to overdraw their account and not to remedy their overdrawn account." Id. p. 34. Bickerstaff directs the Court to evidence that SunTrust also determined whether or not it would extend overdraft coverage to its depositors: "SunTrust pays overdrafts at our discretion, which means that we do not guarantee that we will always authorize and pay any type of transaction." Opp. to Def. Mot. for Summ. J. Ex. 66 ("What You Need to Know about Overdrafts and Overdraft Fees").

Georgia appellate courts have previously recognized that overdraft coverages are loans, though not addressing the specific issue of whether overdraft fees are considered interest. The Supreme Court of Georgia stated that "every overdraft, whether by previous arrangement or not, and whether secured or not, and whether drawing interest or not, is a loan." Duncan v. State, 172 Ga. 186, 189, 157 S.E. 670 (1931) (addressing the constitutionality of a statute imposing criminal liability on bank officers and employees who maintained overdrafts on their accounts, and noting that the question of whether the legislature could punish such conduct was separate inquiry from that under civil law, an overdraft constitutes a loan) (citations and punctuation omitted). The Court of Appeals recognized the same:

> [w]ith respect to an overdraft, the general rule seems to be that a bank may recover the amount of an overdraft from a depositor in the same manner in which it could recover an amount loaned to a customer in the regular course of business. A bank paying an overdraft for a depositor may maintain an action therefor against

him in indebitatus assumpsit.

West v. Federal Deposit Ins. Corp., 149 Ga. App. 342, 346, 254 S.E.2d 392 (1979) (citations and punctuation omitted).

The Georgia legislature did not limit the usury statutes only to "loans" and included "advances" and "forbearance to collect any sum of money." Despite how SunTrust chooses to frame the overdraft coverage, this Court must look beyond the form and words to the substance of the transaction.

> [I]t is the duty of the court to look, not at the form and words, but at the substance of the transaction; and as on the one hand it should not pay attention to the words of the transaction or the manner in which it was negotiated, if the substance of it went to defeat the statute against usury, so on the other hand it ought not to rely upon the words, or form of the transaction, if in substance such transaction was legal.

Rushing v. Worsham & Co., 102 Ga. 825, 30 S.E. 541 (1898); Young v. First Nat'l Bank, 22 Ga. App. 58, 95 S.E. 381 (1918) ("If, however, there be doubt as to whether the transaction is a cover for usury or one bona fide entered into in the ordinary course of business, it should be left to a jury to determine from all the facts and circumstances of the case whether it was a legitimate transaction or a mere device to evade the laws against usury.")

> To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, the theory that a contract will be usurious or not according to the kind of paper

> bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance.

BankWest v. Oxendine, 266 Ga. App. 771, 776, 598 S.E.2d 343 (2004) (quoting Tribble v. State, 89 Ga. App. 593, 596, 80 S.E.2d 711 (1954)).

Although SunTrust now contends voluntary overdraft coverage is just part of maintaining a deposit account rather than a credit transaction, SunTrust cannot avoid the effect that overdraft coverage was an advance of funds to cover withdrawals for which SunTrust expected repayment, and the "accountholder was required to deposit sufficient funds to cover any overdraft and any penalties assessed immediately upon notice of any overdraft." Maher Aff. ¶ 10; Key Depo. 67:4-6. In fact, "[i]f an account balance remained negative for a certain period of time (either five consecutive business days or seven calendar days at different points during the Class Period), the account holder would be charged a flat extended overdraft fee." Maher Aff. ¶ 11. SunTrust's internal operating procedures provided the following definition of overdraft: "An overdraft is the extension of unsecured credit to deposit clients in the form of allowing them to withdraw more funds than they have on deposit." Pl's Br. in Opp. to Mot. for Summ. J. p. 15, Ex. 3. SunTrust's internal documents refer to the overdraft coverage as an extension of credit.[12]

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[12] Pl. Resp. to Def. Mot. for Summ. J. p. 15-17. For example, SunTrust prepared scripted answers to frequently asked customers about the overdraft fees which stated "Overdrafts are a liability for the bank and therefore have fees associated with them, just like loans, to cover

Thus, SunTrust's overdraft coverage was an advance of funds from the bank to its customers. The Court turns to the next inquiry, whether there was a fee for the advance.

b. SunTrust charged a fee for the advance of money

SunTrust argues the overdraft fee was not interest because it was a flat fee; thus no rate was computed. Br. in Supp. of Mot. for Summ. J. p. 29. This position is unsupported by Georgia law. Flat fees are subject to Georgia's usury statutes. "[T]his court has uniformly and consistently held that a lender's charge for service, when no service was in fact rendered or to be rendered the borrower, is a charge for the use of the money advanced and is therefore interest." Williams v. First Bank & Tr. Co., 154 Ga. App. 879, 771, 269 S.E.2d 923, 935 (1980) ($600 service fee subject to a usury analysis); see First Fed. Sav. & Loan Assn. of Atlanta v. Norwood Realty Co., 212 Ga. 524, 531, 93 S.E.2d 763 (1956). Regardless of what SunTrust chose to call it, SunTrust charged a fee for providing overdraft coverage.

c. Whether overdraft fees constituted interest is a question of fact for the jury.

The Court finds as a matter of law that the overdraft fees at issue in this lawsuit are subject to the Georgia usury statutes. Whether the fee is considered interest that violates the usury statutes is a jury issue: "the question whether one intended to exact usury under cover of a contrivance or device, … is for the jury to determine."

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the risk the bank is willing to take in order to provide this courtesy credit to you. Id. Ex. 8.

Tribble, 89 Ga. App. at 596-97. "And where the profit received by the lender, by whatever name it may be called, and whether lawful on its face or not, is in reality a contrivance or device to obtain an amount greater than lawful interest, and is made with intent to violate the usury laws, the transaction is illegal, and … the name by which it is called is altogether immaterial." Id.

> [T]he device of charging for services must not be used as a mere cover to exact an additional profit in excess of legal interest; and therefore, the rule has been laid down that to be considered as lawful and to rescue the contract from the taint of usury, such a charge must be shown to be based upon some service rendered, trouble encountered, inconvenience sustained or risk assumed by the lender, other than the advance of money.

Norwood Realty Co., 212 Ga. at 531 (denying general demurrer); Williams, 154 Ga. App.at 881.

> To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, the theory that a contract will be usurious or not according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance. (Citations and footnotes omitted.) *BankWest*, supra, 266 Ga. App. at 776 (1). (Citations omitted.) *Tribble v. State*, 89 Ga. App. 593, 596 (2) (80 SE2d 711) (1954).

Ga. Cash Am. v. Greene, 318 Ga. App. 355, 362, 734 S.E.2d

67, 73 (2012) (denying grant of partial summary judgment to plaintiff and finding jury question as to usury under payday lending statutes).

It is for the jury to determine whether SunTrust offered services, other than the advance of the money, to justify the fee charged.

> The rule has been laid down that to be considered as lawful and to rescue the contract from the taint of usury, such a charge must be shown to be based upon some service rendered, trouble encountered, inconvenience sustained or risk assumed by the lender, other than the advance of money. And this court has uniformly and consistently held that a lender's charge for service, when no service was in fact rendered or to be rendered the borrower, is a charge for the use of the money advanced and is therefore interest.

Norwood Realty Co., 212 Ga. at 531-32 (finding that allegations that service charge, when no service rendered, was sufficient to sustain allegations of usury, denying demurrer); Williams, 154 Ga. App. at 881. SunTrust argues its fees are reasonable charges to compensate the bank for the numerous services it provided to its account holders and the costs of those services, which included:

1. notifying its account holders of overdraws;
2. providing customer support to customers who overdraft their accounts;
3. considering waivers of fees and refunds;
4. giving customers time to deposit funds after overdraft to avoid fees; and

5. reviewing programs to determine whether to close overdrawn accounts.

Br. in Supp. of Mot. for Summ. J. p. 35; SUMF ¶¶ 11, 27-35.

SunTrust also argues it incurred costs in providing the overdraft services, including:

1. creating managing and supervising the program;
2. implementing and maintaining electronic systems to monitor and administer the program;
3. licensing the software to administer the program;
4. training and compensating employees;
5. obtaining regulatory approval and ensuring compliance;
6. printing and mailing overdraw notices;
7. providing customer support; and
8. reviewing reports to determine if overdrawn accounts should be closed.

Br. in Supp. of Mot. for Summ. J. p. 36; SUMF ¶¶ 29-34.

In opposition, the Class argues SunTrust provided no additional services to its depositors that could justify the amount of the fee,[13] particularly as SunTrust did not

[13] SunTrust contends there is extensive evidence that the fee for the overdraft coverage was justified. For example, the on-line opt in form for overdraft coverage stated: "By filling out and then submitting the information below, you are giving your bank permission to cover overdrafts for ATM and card (Check Card) transactions and to assess

produce evidence that the fee charged was designed to cover the expenses and costs that it allegedly incurred. See generally Br. in Opp. to Mot. for Summ. J. pp. 26-28. The Class contends this Court should follow the Court of Appeals decision in Synovus v. Griner, 321 Ga. App. 359, 739 S.E.2d 504 (2013) in which the Court of Appeals denied a motion to dismiss, finding that overdraft fees, such as those charged in this case could be considered interest for purposes of Georgia usury law:

> Viewing the definitions of interest found in Georgia's usury laws in conjunction with the holdings in Norwood Realty and Williams, we conclude that a "fee" imposed by a financial institution will be considered interest where the financial institution: (1) advances money to a customer; (2) charges the fee in exchange for the advance of money; and (3) renders no service to the customer in exchange for that fee, other than the advance of the money. The overdraft fees at issue in this case appear to meet the first two requirements, and there is not enough evidence at this stage of the litigation to determine whether the third requirement has been satisfied. Accordingly, the trial court acted correctly when it denied the motion to dismiss.

Id. at 368-69. The Georgia Supreme Court vacated the

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a fee for this service." Br. in Opp. to MSJ, Ex. 31. As an answer to frequently asked questions, SunTrust stated, "Overdraft coverage is when you authorize the bank to pay an ATM or one-time debit card transaction when the available balance in your account is not sufficient to cover that transaction amount and charge a fee of $36 for each item that is paid in overdraft." Ex. 33; e.g., Exs. 83, 65.

Court of Appeals decision:

> with direction that the Court of Appeals remand the case to the trial court for further consideration in light of the effect, if any, of the July 3, 2013 Declaratory Order issued by the Georgia Department of Banking and Finance, which declares that to provide parity with national banks, overdraft fees imposed by state-chartered banks in connection with deposit accounts are not subject to Georgia's usury laws.

Synovus Bank v. Griner, 2013 Ga. LEXIS 838 (2013). The Court of Appeals decision, while not binding on this Court, is nonetheless persuasive in its reasoning.

SunTrust argues that decisions by the Georgia Attorney General and one by the Georgia Department of Banking and Finance demand a finding, as a matter of law, that the overdraft fees are not interest. Op. Atty. Gen. 2003-9 (August 12, 2003); Op. Atty. Gen. 2003-8 (July 31, 2003); July 3, 2013 Declaratory Order Georgia Department of Banking and Finance. Neither the decisions of the Attorney General nor the Commissioner are binding on this Court. See Moore v. Ray, 269 Ga. 457, 459, 499 S.E.2d 636 (1998) ("While opinions of the Attorney General are persuasive authority, they are not binding on the appellate courts.") While not binding, the Attorney General Opinions are consistent with this Court's determination that whether the fee in this case constitutes interest is a factual determination.

In Opinion 2003-9, the Attorney General addressed the question of whether an overdraft fee charged in connection with a check transaction constituted interest. The opinion concluded that it likely did not, because the

fee was not based on the time value of money. Specifically, the opinion reasoned:

> [A] transaction that involves an extension of credit and a charge that is based on a time value of money calculation generally will fall under the usury statute unless a statutory exception exists. A charge that is not truly based on a "time value of money" calculation will not, then, be "interest," *provided* that the lender is actually providing a service for which the charge is assessed *and provided* that the charge bears a reasonable relationship to the cost of providing the service. *These provisos have their origin in decisions of the appellate courts of Georgia.*

Id. at p. 2 (citing Norwood Realty). Further, the opinion recognized that "[w]hether a particular overdraft protection plan involves the extension of credit and the charging of interest is a fact-intensive review, and each situation must be considered on a case-by-case basis." Id. As recognized by the Attorney General, this issue of whether an overdraft protection plan involves the charging of interest is a fact intensive review; one that is appropriate for the trier of fact, and not a decision as a matter of law.

Another decision by the Attorney General issued two weeks before, determined whether a fee is to be considered interest is a factual determination:

> Therefore, it is my official opinion that if a loan or origination fee charged in connection with a non-real estate loan of under $3,000 is not adduced based on the time value of the money involved, if its use merely increases the lender's expectation

> of collecting in full the principal amount of the loan plus interest or if the fee is attributable to a service or benefit other than the extension of credit, and if the fee's factual justification is clearly documented in sufficient detail, such a fee should not be considered prepaid interest. As noted in 1980 Op. Att'y Gen. 80-21, at 50, however, '[e]very fee must be judged on its own particular merits, so the amount, variability, and justification should be weighed in determining whether to treat it as prepaid interest.'

Op. Atty. Gen. 2003-8 (July 31, 2003). Both these Attorney General opinions support this Court's determination that a fact finder must decide whether or not the fee charged is attributable to a service or benefit provided.

The Declaratory Order issued by the Commissioner of the Department of Banking and Finance on July 3, 2013 is not binding on this Court for a variety of reasons. It does not, as SunTrust insists, require summary judgment in its favor. To be clear the Declaratory Order is not before the Court on a challenge to its authority, but SunTrust contends this Court is bound to follow its conclusion. The Supreme Court previously directed the Georgia Court of Appeals to consider the effect, if any, of this Declaratory Order in its consideration of the overdraft fees to be subject to Georgia's usury laws. Synovus Bank v. Griner, 2013 Ga. LEXIS 838 (2013). For the following reasons, this Court finds that the Declaratory Order has no effect on the issues before this Court.

Asserting its authority to modify the deposit taking authority of state chartered banks, the Commissioner

issued a Declaratory Order "to provide that overdraft fees on deposit accounts are non-interest fees and charges related to the receipt and withdrawal of deposits in order to achieve parity with national banks." Decl. Order (July 3, 2013) p.4.; O.C.G.A. § 7-1-61(e)(5) (now O.C.G.A. § 7-1-61.1); O.C.G.A. § 7-1-280. The Declaratory Order stated:

> [I]n the event an overdraft is a loan or advance of money, the Commissioner modifies O.C.G.A. § 7-1-292 to provide that the interest and usury limitations incorporated into the statute do not apply to overdraft fees imposed by state-chartered banks. For purposes of clarity, the Commissioner is modifying the phrase 'at rates not exceeding the limits set by the laws of this state,' so that interest and usury limitations under Georgia law do not apply to overdraft fees imposed by state-chartered banks on deposit accounts.

p. 5. The Declaratory Order purportedly had retroactive effect to June 2, 2003.

The Declaratory Order, which purportedly modified Georgia statutes and the application of Georgia usury laws, has no effect on this Court because it violated the constitutional requirement of separation of powers. Ga. Const. Art. I, § 2, ¶ 3. This attempt by a state agency to alter the applicability of Georgia statutes is an invalid exercise of legislative power by the executive branch. E.g., HCA Health Services of Georgia, Inc. v. Roach, 265 Ga. 501, 458 S.E.2d 118 (1995); Central G. R. Co. v. State, 104 Ga. 831, 838, 31 S.E. 531 (1898).

Not only was it an improper attempt to change the laws – an area delegated to the legislature – but also an

improper attempt to construe and modify the meaning of statutory terms such as "interest." This too is a violation of the separation of powers: "Only the judiciary has the constitutional authority to interpret statutes, and we do not delegate that responsibility to either the legislative or executive branch." Schrenko v. DeKalb Cnty. Sch. Dist., 276 Ga. 786, 797, 582 S.E.2d 109 (2003). The Declaratory Order cites Synovus Bank and the Commissioner's recognition "that some cases indicate the possibility that under state law an overdraft can, in certain circumstances, be a loan or an advance of money and, as such, any related fees could be viewed as interest." p. 4 (footnote omitted). The Declaratory Order is an overreach into the authority of the judiciary, and an improper attempt by an executive agency to overrule decisions of the courts.

Assuming *arguendo*, the Declaratory Order's interpretation was valid, it is not possible for it to have a retroactive application for ten years prior to the issuance of the Declaratory Order. The Commissioner stated:

> [T]he provisions of this order apply as of June 2, 2003, the date of the Supreme Court's decision in Beneficial National Bank v. Anderson. As such, overdraft fees charged by state-chartered banks in connection with deposit account transactions on or after June 2, 2003, are non-interest fees directly related to the receipt of deposits and the maintenance of deposit accounts and are not subject to the usury limits set by the laws of this state.

p. 6. This is an improper attempt to retroactively change the law.

A statute is retroactive in its legal sense which

> creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribe to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character. It is well established that this applies to agency regulations and actions as well.

United Am. Ins. Co. v. Ins. Dep't of Ga., 258 Ga. App. 735, 738, 574 S.E.2d 830 (2002) (citations and punctuation omitted). The Declaratory Order's purported mandate violates the constitutional ban on retroactive laws as it "impairs the obligation of contract" in addition to purportedly changing the law. Ga. Const. Art. I, §I, ¶ X.

Therefore, the Declaratory Order is neither binding on this Court nor does it support SunTrust's argument that any of the claims pending in this lawsuit are barred.

d. The 2014 legislative changes to the usury statutes do not apply to this litigation.

In 2014, the General Assembly amended Georgia's usury statutes to add a new subsection that specifically excludes overdraft fees from the definition of interest. Notably, the Georgia General Assembly expressly provided that the changes would not apply to pending litigation: "It is not the intent of the General Assembly to affect the law applicable to litigation pending as of February 19, 2014." 2014 Ga. L. 213 § 3. House Bill 824 amended both the civil usury statute, O.C.G.A. § 7-4-2, and

the criminal usury statute, § 7-4-18, to exclude certain charges from the definition of interest:

> (d) Notwithstanding the foregoing, fees and other charges agreed upon by a financial institution and depositor, as defined in Code Section 7-1-4, in a written agreement governing a deposit, share, or other account, including, but not limited to, overdraft and nonsufficient funds, delinquency or default charges, returned payment charges, stop payment charges, or automated teller machine charges, shall not be considered interest.

The law went into effect on April 15, 2014.

SunTrust provided no legal rationale why this legislation applies to the claims made in this litigation. The lawsuit was pending when the law was passed. To be sure, the changes would apply to similar claims that are not included in this class action litigation, but this litigation - and all the claims brought therein - are not subject to these legislative changes.

e. Intent is an issue of fact to be determined by the jury

Intent is an issue of fact to be determined by the jury. See McCrory v. Young, 158 Ga. App. 678, 282 S.E.2d 163 (1981). Intent is an element of usury. Knight v. First Federal Sav. & Loan Asso., 151 Ga. App. 447, 449, 260 S.E.2d 511 (1979).[14] SunTrust contends it did not intend

[14] "There are four requisites of every usurious transaction: (1) A loan or forbearance of money, either express or implied. (2) Upon an understanding that the principal shall or may be returned. (3) And that for such loan or forbearance a greater profit than is authorized by law *shall be paid or is agreed to be paid*. (4) That the contract was made with an intent to violate the law." (Emphasis in original; citing

to violate the law and it had a reasonable and good faith belief that its overdraft coverage program was lawful, turning to a variety of sources on which it based its good faith belief, including both Georgia and federal regulators, court decisions from outside Georgia, and reliance on legal opinions from its in-house attorneys. Br. in Supp. of Mot. for Summ. J. pp. 44-48. Not surprisingly, Bickerstaff argues there is a plethora of evidence that SunTrust intended to charge usurious rates. Opp. to Def. Mot. for Summ. J. pp. 80-99. The inquiry, however, is not whether SunTrust intended to violate Georgia's usury laws, but whether SunTrust intended to charge its customers, and that charge violated Georgia's usury laws. In this case, the Court cannot rule on intent as a matter of law. This is a jury issue.

3. SunTrust is entitled to summary judgment on Plaintiff's claims for Criminal Usury

The Class concedes it does not have an independent cause of action under the criminal usury statute; thus, to the extent SunTrust moved for summary judgment on a count of criminal usury, summary judgment is granted. See Anthony v. Am. Gen. Fin. Servs., Inc. 287 Ga. 448, 459, 697 S.E.2d 448 (2010).

4. The One Year Statute of Limitations for Usury bars claims that accrued before July 12, 2009.

SunTrust argues that some of the Class's claims are barred by the usury statute's one-year statute of limitation, effectively foreclosing claims that accrued more than a year before the complaint was filed, i.e. before

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Bank of Lumpkin v. Farmers State Bank, 161 Ga. 801, 810, 132 SE 221 (1926)).

July 12, 2009. The Class alleges the 4-year statute of limitations for the two common-law counts – conversion[15] and money had and received[16] – applies to all the Class's claims. O.C.G.A. §§ 9-3-32; 9-3-25.

The Georgia legislature established a one-year statute of limitations for usury claims. O.C.G.A. §7-4-10 (d). The only basis for the Class's common law claims of conversion and money had and received, as it acknowledges, is a violation of the usury statutes:

> Rather, proof that SunTrust's overdraft fees violated the civil usury statute, O.C.G.A. § 7-4-2, or criminal usury statute, O.C.G.A. § 7-4-18, would establish that the overdraft fees the Class Members paid are their property (for purposes of conversion) and justly belong to the Class

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[15] A party may state a claim for conversion in **at least** two ways:

> (1) A conversion results when, without authority, a party exercises the right of ownership over, assumes dominion over, or appropriates personal property belonging to another party, in hostility of that other party's rights. (2) To establish a conversion claim, a plaintiff must demonstrate that (1) he or she owns title to or has the right to possess the personal property at issue; (2) the defendant actually possesses the property; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return it.

Rubenstein v. Palatchi, 359 Ga. App. 139, 142, 857 S.E.2d 81 (2021) (citation omitted).

[16] "The common law action for money had and received is founded upon the equitable principle that no one ought to unjustly enrich himself at the expense of another. This action is maintainable in all cases where one has received money under such circumstances that in equity and good conscience he ought not to retain it." Edible IP, LLC v. Google, LLC, 313 Ga. 305, 317-18, 869 S.E.2d 481 (2022) (citation and punctuation omitted).

> Members (for purposes of money had and received).

Opp. to Mot. for Summ. J. p. 115; see First Am. Compl, ¶¶ 16, 105, 113, 114. The common law claims are based solely on the allegations that the overdraft fees are actually usurious interest charges. In order to recover under these common law claims, the jury must find that the overdraft fees charged by SunTrust violated Georgia's usury laws. If there is no finding of usury, then there can be no recovery.

The issue here is not whether a plaintiff can assert common law claims in addition to usury, but whether, based upon the law and the facts in this case, the statute of limitations for usury applies when the sole basis of recovery for the common law claims is a finding of usury. The Court is well-aware of a plaintiff's ability to pursue alternative theories of recovery. The Class's position goes beyond alternative theories; instead a finding of usury is a condition precedent to any recovery. Bickerstaff III recognized as much: "Bickerstaff's claims for money had and received and conversion seek to recover all payments under SunTrust's overdraft program deemed to be usurious, and it is well established that the voluntary payment doctrine does not apply to the recovery of usury." 349 Ga. App. at 804, 824 S.E.2d at 725 (emphasis supplied). Accepting the Class's argument would permit a work-around for the usury statute of limitations and render it meaningless.

O.C.G.A. § 9-3-99, which tolls causes of action for torts arising out of crimes, does not apply. Usury is not a tort. W. Sky Fin., LLC. v. State of Ga., 300 Ga. 340, 361, 793 S.E.2d 357, 374-75 (2016) (analyzing statute of limitations

with regard to payday lending action). "[A] limitation for charges imposed for use of money did not exist at common law and that usury is a creature of legislation. Certainly, the remedies that may be pursued with respect to a loan that includes an illegal interest rate are defined by statute…" Id.; see O.C.G.A. §7-4-10(a).

The legislature established a one-year statute of limitations for usury. The Class cannot avoid this limitation by alleging common law claims that are based solely on alleged usurious interest. Finding otherwise would render the usury statute of limitations meaningless. Therefore, summary judgment is **GRANTED** as to the Class's claims that accrued before July 12, 2009.

CONCLUSIONS

IT IS HEREBY ORDERED as follows:

1. SunTrust's Motion to Dismiss for Insufficiency of Service is **DENIED**;
2. Motion to Compel Arbitration is **GRANTED IN PART AND DENIED IN PART.** The Motion to Compel Arbitration is **GRANTED** as to account holders who closed their accounts prior to June 1, 2010.
3. Motion to Modify Class Definition is **GRANTED IN PART and DENIED IN PART.** To provide clarity the Class Definition hereby specifies what is required of citizenship:

   Every **person who was a Georgia citizen on the date Plaintiff filed this Complaint, and has thereafter continuously remained through October 6, 2017, a citizen of Georgia** who had or has one or more accounts with

SunTrust Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

4. Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**: Motion for Summary Judgment is granted as to claims that accrued before July 12, 2009.

V. REQUESTS FOR LEAVE TO FILE UNDER SEAL

The parties requested orders allowing unredacted copies of various documents to be filed with the Clerk's office under seal:

1. Unredacted copies of the Class's Summary Judgment-Related Response Materials;
2. Unredacted version of the Class's Reply In Support of Plaintiff's Motion to Exclude, In Part, Testimony and Opinions of Defense Experts Bob Birmingham III, Victor Stango, and Bernard Woolfley;
3. Unredacted copies of certain errata sheets filed by Defendant; and
4. Unredacted version of the Class's February 1, 2024 Notice of Filing Additional Discovery and exhibits;

The Court reviewed the documents and determined that portions of the aforementioned documents contain

confidential information. Accordingly,

IT IS HEREBY ORDERED that unredacted copies of the following be filed with the Clerk's office under seal:

1. The Class's Opposition to SunTrust's Motion for Summary Judgment;
2. The Class's Response to SunTrust Bank's Theories of Defense and Statement of Undisputed Material Facts;
3. The Class's Opposition to SunTrust's Motion to Exclude Expert Opinions and Testimonies;
4. The 100 exhibits publicly filed redacted with The Class's Appendix in Support of Their Opposition to SunTrust Bank's Motion and Brief in Support of Summary Judgment and Response to Statement of Undisputed Material Facts
5. The 20 exhibits publicly filed redacted with The Class's Appendix in Support of their Opposition to SunTrust's Motion to Exclude Expert Opinions and Testimonies:
6. The 25 exhibits publicly filed redacted with the [Class's] Notice of Filing Additional Discovery;
1. The Class's Reply In Support of Plaintiff's Motion to Exclude, In Part, Testimony and Opinions of Defense Experts Bob Birmingham III, Victor Stango, and Bernard Woolfley;
2. Defendant's Exhibit 7 – Errata Sheet for the Deposition of Charles D. Cowan;
3. Defendant's Exhibit 8 – Errata Sheet for the 30(b)(6) Deposition of Jennifer Key;

4. Defendant's Exhibit 9 – Errata Sheet for the Deposition of Alexandra Maher;
5. Defendant's Exhibit 10 – Errata Sheet for the Deposition of Whitney Stewart;
6. Defendant's Exhibit 11 – Errata Sheet for the Deposition of Bernard F. Woolfley;
7. Classs' Exhibit 26 (filed Nov. 28, 2023) – Errata Sheet for Deposition of Victor Stango;
8. Class's Exhibit 27 (filed Nov. 30, 2023) – Errata Sheet for Deposition of Bob Birminghma III;
9. Class's Exhibit 28 (filed Nov. 30, 2023) – Errata Sheet for Deposition of Joel Howle;
10. Class's Exhibit 29 (filed Nov. 30, 2023) – Exhibits from Deposition of Joel Howle; and
11. Class's Exhibit 30 (filed Dec. 7, 2023) – Errata Sheet for Deposition of Laurie Pennington.

VI. SCHEDULING ORDER

The jury trial in this case remains specially-set to begin **April 29, 2024**. Having considered the Joint Motion to Amend Scheduling Order, and finding that such amendment would aid in the efficient and orderly trial of this matter beginning April 29, 2024, the Joint Motion to Amend Scheduling Order is **GRANTED** and the Scheduling Order entered September 22, 2022 is **HEREBY MODIFIED** as follows:

1. The deadline for (a) the parties to exchange preliminary trial "will call" and "may call" witness lists (except witnesses solely for purposes of impeachment) and (b) SunTrust to file any motion

to bifurcate is **March 8, 2024**.

2. The deadline for the parties to exchange (a) additional trial witness lists in response to the opposing party's list, (b) preliminary trial exhibit lists, and (c) deposition designations for witnesses to be called at trial on deposition testimony is **March 22, 2024**.

3. The deadline for the parties to file (a) the Consolidated Pre-Trial Order (CPTO) (including final exhibit lists), (b) motions in limine, and (c) the Class's response to any motion to bifurcate shall be E-Filed and a copy in Word version of the CPTO and Motions in Limine emailed to the Court's Staff Attorney, Lisa Liang, at lisa.liang@fultoncountyga.gov, no later than **12:00 PM** on **April 3, 2024**.

    a. **CPTO**: The following procedures are to be followed in the preparation and filing of the CPTO and supersede any provisions to the contrary provided by the parties:

        i. **The parties shall use the Court's Consolidated Pre-Trial Order**, available in Word version by emailing the Court's Judicial Assistant, Kimberley Davis, at kimberley.davis@fultoncountyga.gov. The Court's CPTO contains significant additions and modifications to Paragraphs 3, 5, 11, 14, 18, and 19.

        ii. Counsel shall consolidate the proposed pre-trial order. **Failure of a party to submit its portion of the proposed pre-**

trial order may result in sanctions. Unif. Sup. Ct. R. 7.1.

b. **Motions in Limine**: Except for unforeseen evidentiary issues, all motions in limine are to be filed contemporaneously with, or as a part of, the proposed CPTO. Parties shall not file motions in limine that are "so vague and overly broad as to render it virtually meaningless as a vehicle to decide an issue before it [is] raised in context at trial." Williams v. Harvey, 311 Ga. 349, 452-53, 858 S.E.2d 479 (2021). Nor shall parties file motions in limine that request that the Court and opposing parties file established rules of evidence. Motions in limine shall point out with specificity the objectionable evidence and show why the evidence is not admissible at trial.

The Court will hear oral argument, if necessary, during the Pre-Trial Conference. Parties must confer before the Pre-Trial Conference to narrow the motions in limine for argument and must file responses thereto and advise Ms. Liang by email no later than **12:00 P.M. on April 8, 2024** which motions are withdrawn or stipulated. Parties acknowledge that counsel are directed to notify the Court – on the record – at the time of any alleged violation, of the contention that the Court's ruling on a motion in limine has been violated during trial.

4. **Deposition Designations and Objections**: Counsel shall make a good faith effort to resolve any objections in depositions to be presented at trial. All unresolved objections – including objections and responses to rebuttal deposition designations – together with the deposition transcript, argument, and citations, shall be eFiled, with a copy to Ms. Liang via email. The deadline for the parties to file (a) responses to motions in limine, and (b) objections, responses and rebuttal designations to deposition designations is **12:00 PM on April 8, 2024**.

5. The deadline for the parties to file (a) requested preliminary jury instructions; (b) authenticity objections to trial exhibits; and (c) SunTrust's reply brief in support of its motion to bifurcate is **April 3, 2024.**

6. The deadline for the parties to file objections to requested preliminary jury instructions is **April 8, 2024**.

7. The pre-trial conference (including hearings on motions referenced above) is specially set for **April 10, 2024 at 9:30 a.m.** at the Fulton County Justice Center Tower, 185 Central Ave, SW, **Courtroom 2A,** Atlanta, Georgia, for the purpose of a Pre-Trial Conference. Parties shall provide their own court reporter. The Zoom link for exhibits only: https://zoom.us/j/92857792871 (Meeting ID: 928 5779 2871).

8. All other requested jury charges shall be submitted at the commencement of trial on **April 29, 2024** per U.S.C.R. 10.3. The Court will give

the jury a written copy of the charge to have in the jury room. Barefoot v. Denson, 364 Ga. App. 64, 67, 873 S.E.2d 733 (2022).

SO ORDERED this 4th day of March, 2024.

Susan E. Edlein
Susan E. Edlein
Judge, State Court of Fulton County

APPENDIX D

THIRD DIVISION
RICKMAN,
GOBEIL and COOMER, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. https://www.gaappeals.us/rules

March 6, 2019

In the Court of Appeals of Georgia

A18A1519. SUNTRUST BANK v. BICKERSTAFF

GOBEIL, Judge.

In 2010, Jeff Bickerstaff, Jr.,[1] a customer of SunTrust Bank ("SunTrust"), filed a complaint against SunTrust on behalf of himself and all others similarly situated asserting that SunTrust's overdraft fees constitute unlawful interest charges and raising claims for violation of Georgia's civil and criminal usury laws (OCGA §§ 7-4-2 and 7-4-18, respectively), money had and received, and conversion. This is the third appearance of this case before this Court. In the instant appeal, SunTrust challenges the Superior Court of Fulton County's order holding SunTrust's class-action litigation waiver unconscionable and granting Bickerstaff's motion for class certification, pursuant to OCGA § 9-11-23. SunTrust argues that the trial court erred in (1) finding the class-

[1] Jeff Bickerstaff passed away during the ongoing litigation, and the Executor of his Estate, Ellen Bickerstaff, was substituted as the named plaintiff.

action waiver unconscionable, and (2) granting class certification. For the reasons that follow, we affirm.

Background and Procedural History

Like many banking institutions, SunTrust provides an automated overdraft program that allows an account holder's ATM or debit card transaction to be approved even if the approved amount exceeds the account holder's available balance. In other words, the customer has insufficient funds to cover the transaction and SunTrust advances the customer the necessary funds to cover the transaction, but, in return, charges the customer a flat fee per overdraft transaction. During the relevant time period, SunTrust charged a flat overdraft fee of $32 or $36 per overdraft transaction. In the complaint, Bickerstaff alleged that, on multiple occasions, SunTrust "advance[d] money to Plaintiff in amounts less than $3,000 and collected Overdraft Fees from Plaintiff in connection with each such advance." He maintained that SunTrust's overdraft fees in fact constitute interest charged by SunTrust for the use of the money SunTrust advanced/loaned account holders to cover overdrafts on their accounts, and that the rate of interest grossly exceeded the rate allowed under Georgia's usury laws.

The record reveals that, in 2009, when Bickerstaff opened his account with SunTrust, he, like all SunTrust customers, signed a document acknowledging receipt of SunTrust's Rules and Regulations for Deposit Accounts – an approximately 40-page, single-spaced, fine-print booklet ("the Rules and Regulations") – and agreeing to be bound by the Rules and Regulations. In relevant part, in an introductory section preceding the table of contents, the Rules and Regulations included a provision that "[a]

determination that any part of this agreement is invalid or unenforceable will not affect the remainder of this agreement." On page 22 of the booklet, the Rules and Regulations included a mandatory arbitration provision, which provided as follows:

> DISPUTE RESOLUTION
>
> READ THIS PROVISION CAREFULLY AS IT WILL HAVE A SUBSTANTIAL IMPACT ON HOW LEGAL CLAIMS YOU AND WE HAVE AGAINST EACH OTHER ARE RESOLVED. For a Claim subject to arbitration, neither the Depositor nor the Bank will have the right to: (1) have a court or a jury decide the Claim; (2) engage in information-gathering (discovery) to the same extent as in court; (3) participate in a class action in court or in arbitration; or (4) join or consolidate a Claim with claims of any other person. The right to appeal is more limited in arbitration than in court and other rights in court may be unavailable or limited in arbitration.
>
> ARBITRATION. Notwithstanding any other provision in these rules and regulations, if either Depositor or the Bank has any unresolvable dispute, controversy or claim . . . whether founded in contract, tort, statutory or common law, concerning, arising out of or relating to the Account or these rules and regulations . . . upon the demand of either party, it will be resolved by individual (not class or class-wide) binding arbitration[.]

Additionally, on page 24, the Rules and Regulations contained a jury trial waiver provision, which provided as

follows:

> **JURY TRIAL WAIVER.** FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. *FURTHER, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.*

(emphasis supplied). The final sentence of the above paragraph is at issue in this case and is hereinafter referred to as the "class-action waiver."

After Bickerstaff filed the underlying complaint, SunTrust revised its Rules and Regulations and provided customers with the ability to opt out of arbitration. SunTrust moved to compel arbitration in the underlying case, which the trial court denied, finding that Bickerstaff effectively exercised his right to opt out of arbitration by filing the instant complaint.[2]

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[2] Suntrust filed an application for interlocutory appeal of the order denying its motion to compel arbitration, which we granted in Case. No. A12A2547, and Bickerstaff cross-appealed in Case No. A12A2548. However, we later dismissed both appeals as having been improvidently granted.

Subsequently, SunTrust entered into an agreed upon stipulation related to class certification, stipulating to the following:

> 1. SunTrust maintains documents and/or data sufficient to identify the following information related to individual consumer deposit accounts in which an ATM card or debit card transaction caused an overdraft of the account ("Overdraft") during the putative class period of July 12, 2006, to July 2010 ("Class Period") and for which an overdraft fee and/or an extended overdraft fee was charged to the account (together, "Overdraft Fee"):
>
> a. the individual customer's name, account number, and mailing address;
>
> b. the date each Overdraft was incurred and the amount of the Overdraft;
>
> c. the date and amount of any Overdraft Fee that was charged to the account;
>
> d. the dates that the account which had an Overdraft subsequently had any transaction that affected the account balance, including, but not limited to, any deposits, credits, or debits and the amount, nature, and posting date of such transactions;
>
> e. the date that an account which had an Overdraft subsequently had a positive balance, if it did ever have such a positive balance; and
>
> f. the date and amount of any adjustments, credits, or refunds of any Overdraft Fee incurred on the account.

> 2. With a sufficient amount of time and expense, it is possible to obtain and process the documents and/or data sufficient to show the information listed in paragraph 1 above. SunTrust will not argue that class certification should be denied on the basis that it would be unduly burdensome, difficult, or impossible to obtain and produce the documents and data referenced in paragraph 1 above. SunTrust reserves and retains all rights to object to Plaintiff's request for production of documents.
>
> 3. The number of individuals who maintain consumer deposit accounts with Georgia mailing addresses which have been assessed an Overdraft Fee caused by an Overdraft during the Class Period exceeds 1,000.
>
> 4. SunTrust will not argue that class certification should be denied on the basis that the systems or processes used to record an Overdraft and assess an Overdraft Fee during the Class Period differ materially from customer to customer.
>
> 5. During the Class Period, the Overdraft Fee ranged from $32.00 to $36.00. SunTrust will not argue that class certification should be denied on the basis that the amounts of putative class members' individual claims related to Overdraft Fees are sufficiently large for it to be feasible for such claims to be brought individually. . . .

In 2013, Bickerstaff moved for class certification, pursuant to OCGA § 9-11-23. SunTrust opposed class certification, arguing, in relevant part, that (1) the class-action waiver in the Rules and Regulations precluded

certification; (2) Bickerstaff could not opt out of the arbitration agreement on behalf of the class; and (3) Bickerstaff could not satisfy the numerosity, commonality, typicality, and adequacy of representation requirements for class certification under OCGA § 9-11-23. In reply, Bickerstaff asserted, among other arguments, that the class-action waiver was unconscionable, and, alternatively, was unenforceable as a matter of law because it was a non-severable part of the unenforceable jury trial waiver.

Following a hearing, the trial court denied Bickerstaff's motion for class certification, finding that the class lacked numerosity because Bickerstaff could not reject arbitration on behalf of the putative class.[3] Bickerstaff appealed the denial of class certification (Case No. A14A1780), and SunTrust cross-appealed the denial of its motion to compel arbitration (Case No. A14A1781). We affirmed the trial court's denial of both motions. *Bickerstaff v. SunTrust Bank*, 332 Ga. App. 121 (770 SE2d 903) (2015) ("*Bickerstaff I*"). Bickerstaff appealed the class certification issue to our Supreme Court,[4] and the Court reversed and remanded the case for further proceedings, holding that

> the terms of the arbitration rejection provision of SunTrust's deposit agreement do not prevent Bickerstaff's class action complaint from tolling

[3] In reaching its decision, the trial court only addressed the numerosity factor under OCGA § 9-11-23 (a) and did not consider the other remaining factors, or the validity and effect of the class-action waiver in the Rules and Regulations.

[4] SunTrust did not appeal the determination that Bickerstaff had opted out of the mandatory arbitration provision by filing the underlying complaint. *Bickerstaff II*, 299 Ga. at 461 n.4.

> the contractual limitation for rejecting that provision on behalf of all putative class members until such time as the class may be certified and each member makes the election to opt out or remain in the class. Accordingly, the numerosity requirement of OCGA § 9-11-23 (a) (1) for pursuing a class complaint is not defeated on this ground.

Bickerstaff v. Suntrust Bank, 299 Ga. 459, 470 (788 SE2d 787) (2016) ("*Bickerstaff II*"). SunTrust filed a petition for writ of certiorari to the United States Supreme Court, which was denied. See *SunTrust Bank v. Bickerstaff*, 137 S.Ct. 571 (196 Led 2d 447) (2016).

On remand, following supplemental briefing by the parties,[5] the trial court found that the class-action waiver (contained in the jury trial waiver provision of the Rules and Regulations) was procedurally and substantively unconscionable. Additionally, the trial court found that all of the requirements of OCGA § 9-11-23 were met and certified the following class:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees.

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[5] The trial court explained that it would be considering all of the matters previously briefed, and, therefore, the parties were to use supplemental briefing to address new or additional case law and not to reargue "what has already been said" in the supplemental briefing.

This appeal followed.

"The issues of contract construction and enforceability are generally questions of law for a court to resolve and are therefore subject to de novo review on appeal." *Precision Planning, Inc. v. Richmark Communities, Inc.*, 298 Ga. App. 78, 78 (679 SE2d 43) (2009). We review a trial court's grant of class certification for abuse of discretion. See *J. M. I. C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 375 (2) (634 SE2d 123) (2006). With these principles in mind, we turn to SunTrust's enumeration of errors.

1. The first issue before us is whether the class-action waiver in SunTrust's Rules and Regulations is enforceable. The trial court found that the class-action waiver was unconscionable and therefore unenforceable. In three interrelated enumerations of error, SunTrust argues that the trial court erred in finding that the class-action waiver was unconscionable. On the other hand, Bickerstaff argues that we need not reach the question of unconscionability because the class-action waiver is unenforceable as a matter of law as it is a non-severable, integrated part of the legally unenforceable jury trial waiver. SunTrust does not dispute that the jury trial waiver is unenforceable as a matter of law in Georgia,[6] but maintains that the class-action waiver is severable from the otherwise invalid provision. For the reasons that follow, we agree with Bickerstaff.

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[6] SunTrust notes that, although pre-litigation contractual jury trial waivers are unenforceable in Georgia, such waivers are enforceable in other states where SunTrust operates. That fact, however, is irrelevant to this appeal because it is undisputed that Georgia law applies in this case.

Our Supreme Court has held "that pre-litigation contractual waivers of the right to trial by jury are not enforceable in cases tried under the laws of Georgia." *Bank South, N.A. v. Howard*, 264 Ga. 339, 340-341 (444 SE2d 799) (1994). SunTrust's class-action waiver is not an independent provision. Rather, it is a single sentence contained in the unenforceable jury trial waiver provision. Nevertheless, SunTrust maintains that the class-action waiver is severable based on the general severability clause appearing at the beginning of the Rules and Regulations, which provides that "[a] determination that any part of this agreement is invalid or unenforceable will not affect the remainder of this agreement." However, "[t]he concept of severability refers to striking a distinct part [of a contract and allowing the remainder to stand], not to excising certain language contained in a single provision." *AMB Property, L.P. v. MTS, Inc.*, 250 Ga. App. 513, 515 (551 SE2d 102) (2001) (footnote omitted);see also OCGA § 13-1-8 (a) ("A contract may be either entire or severable. In an entire contract, the whole contract stands or falls together. In a severable contract, the failure of a distinct part does not void the remainder."). In other words, the severability clause allows the remainder of the Rules and Regulations to stand if the jury trial waiver, or any other provision, is voided or deemed unenforceable. The severability clause, however, does not authorize SunTrust or the courts to excise a single sentence (the class-action waiver) from a single integrated provision (the jury trial waiver). *AMB Property*, 250 Ga. App. at 515. Accordingly, because the class-action waiver is a non-severable part of the unenforceable jury trial waiver provision, we agree with Bickerstaff that the class-

action waiver is unenforceable as a matter of law.[7]

2. SunTrust argues on appeal that, even in the absence of the class-action waiver, class certification under OCGA § 9-11-23 (b) (3) was inappropriate because individual issues predominate over any common question of law or fact. For the reasons that follow, no abuse of discretion appears in the trial court's decision to certify the class.

The requirements for class certification are set forth in OCGA § 9-11-23 (a) and (b). "In determining the propriety of a class action, the first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the requirements of OCGA § 9-11-23 have been met." *Fortis Ins. Co. v. Kahn*, 299 Ga. App. 319, 324 (2) (c) (683 SE2d 4) (2009) (citation, punctuation and footnote omitted). Thus, in order to certify a class a trial court must find that:

> (1) [t]he class is so numerous that joinder of all members is impracticable;
>
> (2) [t]here are questions of law or fact common to the class;
>
> (3) [t]he claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) [t]he representative parties will fairly and adequately protect the interests of the class.

---

[7] Although the trial court did not find this issue dispositive, "[u]nder the right for any reason doctrine, [we] will affirm a judgment if it is correct for any reason, even if that reason is different than the reason upon which the trial court relied." *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 137 (2) (816 SE2d 77) (2018) (citation and punctuation omitted).

OCGA § 9-11-23 (a).[8] Additionally, the trial court must determine that at least one ground of OCGA § 9-11-23 (b) is satisfied. See *Bickerstaff II*, 299 Ga. at 461-462 ("Under Georgia law, a case may proceed as a class action if all prerequisites of OCGA § 9-11-23 (a) are satisfied: numerosity, commonality, typicality, and adequacy, and if at least one ground of OCGA § 9-11-23 (b) is satisfied.") (citation and punctuation omitted). In relevant part, OCGA § 9-11-23 (b) (3) provides that a class action may be maintained if "[t]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

"Trial judges have broad discretion in deciding whether to certify a class, and plaintiffs bear the burden of proving class certification is appropriate. Absent an abuse of the trial judge's discretion in certifying a class, such decision must be affirmed." *J. M. I. C. Life Ins.*, 280 Ga. App. at 375 (2) (citations omitted). "Moreover, we will not reverse factual findings in a trial court's class certification order unless they are clearly erroneous. Under the 'clearly erroneous' test, factual findings must be affirmed if supported by any evidence." *Resource Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 729 (3) (698 SE2d 19) (2010) (citation and punctuation omitted).

First, SunTrust asserts that class certification is improper under OCGA § 9-11-23 (b) (3) because the class-action waiver is enforceable, and, regardless, whether the waiver is procedurally unconscionable is an individualized

[8] SunTrust does not challenge the trial court's finding that the prerequisites of OCGA § 9-11-23 (a) were satisfied.

issue. We disagree. As discussed in Division 1, the class-action waiver is unenforceable as a matter of law.

Second, SunTrust argues that whether its overdraft fees constitute interest cannot be determined on a class-wide basis because the particular services involved and costs incurred by SunTrust vary with each fee, and "[a] service charge is not interest if it was based upon some service rendered, trouble encountered, inconvenience sustained or risk assumed by [SunTrust], other than the advance of money." However, this argument is belied by SunTrust's stipulation that it "would not argue that class certification should be denied on the basis that the systems or processes used to record an Overdraft and assess an Overdraft Fee . . . differ materially from customer to customer." Furthermore, "[t]he commonality requirement does not require that all questions of law and fact be common to every member of the class. Rather, the rule requires only that resolution of the common questions affect all or a substantial number of the class members." *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 903-904 (2) (a) (ii) (710 SE2d 569) (2011) (citation and punctuation omitted); *J. M. I. C. Life Ins.*, 280 Ga. App. at 375 (2) ("a class action is authorized if the members of the class share a common right and common questions of law or fact predominate over individual questions of law or fact. The nature of the right to be enforced may be in common, though the facts as to each member of the alleged class may be different") (citations and punctuation omitted). Moreover, "[w]hat matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." See *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338, 350 (II) (A) (131 S.Ct. 2541, 180 LEd2d 374) (2011)

(citation and punctuation omitted).

Here, the putative class members challenge the legality of SunTrust's overdraft fees, namely whether the overdraft fees constitute unlawful interest under Georgia law. This question will be determined by examination of a common set of terms in identical form contracts that apply to all members of the putative class, and we have held that "claims arising from interpretation of form agreements are considered to be 'classic cases' for treatment as a class action." *Resource Life*, 304 Ga. App. at 729 (3) (a) (citation and punctuation omitted). More importantly, the answer to this question will not vary with each class member. Thus, a classwide proceeding in this case has the capacity to generate common answers that will drive the resolution of this litigation and renders a class action superior to other available methods for the fair and efficient adjudication of the controversy. *Dukes*, 564 U. S. at 350 (II) (A).

Third, SunTrust asserts that class certification is improper because, if the overdraft fees constitute interest, then the term of each "loan" will have to be determined on an individualized basis for purposes of calculating damages. In other words, the "loan" begins on the date the overdraft is incurred and ends on the date the overdraft and the overdraft fee(s) are repaid by the account holder (i.e. when the account holder brings his or her account balance positive). Therefore, SunTrust is correct that, if Bickerstaff prevails on his claim that the overdraft fees constitute interest, the term of each loan will vary from customer to customer. However, it is well established that "the need for individual damage calculations does not defeat class certification, so long as the liability inquiry presented common legal issues."

Earthlink, Inc. v. Eaves, 293 Ga. App. 75, 77 (1) (666 SE2d 420) (2008) (footnote omitted). As discussed above, the common legal issue of whether SunTrust's overdraft fees constitute interest predominates and the answer to that question will determine SunTrust's liability for all putative class members. Furthermore, SunTrust stipulated that it maintains and can access information for each putative class member's account related to the date and amounts of any overdraft fees charged ("the loan") during the relevant class period, the date that such fees were paid (i.e. the date the customer's account had a positive balance and the loan was therefore "paid off"), and any adjustments, credits, or refunds any class member may have received in relation to the charged overdraft fees. Bickerstaff's expert in data analysis stated in his deposition that it would be possible to use this information to determine the term of the loans for each customer. Thus, any individual factual variations concerning the term of the loan(s) would not necessitate the application of a different set of legal principles. Rather, "when the loan termination date is plugged in to the other information [SunTrust] admits it keeps for all [account holders], it is simply a formulaic administrative matter to determine both who is owed a refund and how much each [account holder] is owed. The fact that there may be differences in the damages for the members of the class does not prevent certification[.]" *Resource Life*, 304 Ga. App. at 731-732 (3) (a) (citation and punctuation omitted).

Finally, SunTrust asserts that class certification is improper because each class member's ability to recover on the claims for conversion and money had and received will depend on an individualized inquiry as to whether the

voluntary payment doctrine bars recovery.[9] This argument is unpersuasive. Bickerstaff's claims for money had and received and conversion seek to recover all payments under SunTrust's overdraft program deemed to be usurious, and it is well-established that the voluntary payment doctrine does not apply to the recovery of usury. See, e.g., *Dell v. Kugel*, 99 Ga. App. 551, 561 (8) (109 SE2d 532) (1959) (holding "[t]hat usury [voluntarily] payed [sic] may be recovered back, under the laws of this State") (citation and punctuation omitted); *Morgan v. Shepherd*, 171 Ga. 33, 38-39 (3) (154 SE 780) (1930) (explaining that usury voluntarily paid can be recovered because "a payment of usurious interest is regarded as obtained by taking advantage of the necessities of the borrower, and is therefore excepted from the ordinary rule that one who voluntarily pays money on an illegal demand can not maintain an action to recover such payment"). Thus, if Bickerstaff is successful on his claim that SunTrust's overdraft fees constitute interest and are usurious, the voluntary payment doctrine will not bar recovery by the putative class members. Accordingly, this issue does not preclude class certification.

In light of the foregoing, we conclude the trial court did not abuse its discretion in certifying the class.

Judgment affirmed. Rickman and Coomer, JJ.,

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[9] Under the voluntary payment doctrine, "[p]ayments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered unless made under an urgent and immediate necessity thereof or to release person or property from detention or to prevent an immediate seizure of person or property." OCGA § 13-1-13.

concur.

March 28, 2019

ON MOTION FOR RECONSIDERATION

SunTrust has moved for reconsideration of our decision, focusing on our ruling in Division 1, regarding the issue of severability of the class-action waiver from the legally unenforceable jury trial waiver. In its motion, SunTrust substantively argues for the first time in this Court that the class-action waiver is an additional independent promise that can be severed and stand alone based on the waiver's plain language. SunTrust did not raise this argument in its appellant brief or reply brief in this Court, nor did it cite a majority of the cases on which it now relies for its position.[2] Furthermore, a review of the record confirms that it did not make this substantive argument in the trial court. Thus, SunTrust waived this argument. See *Milligan v. State*, 307 Ga. App. 1, 6 (703 SE2d 1) (2010) (denying motion for reconsideration because it relied on a newly-raised argument); see also *Estate of Nixon v. Barber*, 340 Ga. App. 103, 110 (2) (796 SE2d 489) (2017) (issue abandoned where appellant failed to cite authority in support of same); *Locke's Graphic &*

[2] In its initial brief before us, SunTrust noted in a footnote that "the contract states any invalid language is severable." Similarly, in its reply brief, SunTrust asserted, without any supporting argument, that "the sentence waiving a jury trial and the sentencing waiving class procedures are distinct, independent promises." SunTrust never argued or provided any authority in its briefs before us or the court below that the plain language of the waiver compelled a conclusion that the class-action waiver was an independent, stand alone provision.

Vinyl Signs, Inc. v. Citicorp Vendor Finance, Inc., 285 Ga. App. 826, 828 (2) (a) (648 SE2d 156) (2007) ("An argument not raised in the trial court is waived and cannot be raised for the first time on appeal.").

SunTrust also argues incorrectly that our decision prohibits a court from severing one or more contractually enforceable sentences from an otherwise unenforceable contractual clause, regardless of the circumstances and without considering the contract as a whole. And, according to SunTrust, this holding conflicts with other precedent. Given that SunTrust misstates our holding, we take this opportunity to clarify our decision. Based on the unique context of this case we determined the class-action waiver is not severable because it was part of a single integrated provision. OCGA § 13-1-8 (a) ("A contract may be either entire or severable. In an entire contract, the whole contract stands or falls together. In a severable contract, the failure of a distinct part does not void the remainder."); *AMB Property, L.P. v. MTS, Inc.*, 250 Ga. App. 513, 515 (551 SE2d 102) (2001) ("The concept of severability refers to striking a distinct part [of a contract and allowing the remainder to stand], not to excising certain language contained in a single provision.") (footnote omitted).

Contracts of adhesion, such as the one here "are strictly construed against the drafter"– in this case SunTrust. *Western Pacific Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 681 (1) (n.5) (601 SE2d 363) (2004). Additionally, "[i]t is the function of the court to construe the contract as written and not to make a new contract for the parties." *Record Town, Inc. v. Sugarloaf Mills Ltd. Partnership of Georgia*, 301 Ga. App. 367, 370 (3) (687 SE2d 640) (2009) (citation and punctuation omitted);

Fernandes v. Manugistics Atlanta, Inc., 261 Ga. App. 429, 433 (1) (582 SE2d 499) (2003) ("Neither the trial court nor this Court is at liberty to rewrite or revise a contract under the guise of construing it.").

When determining whether the class-action waiver is an independent provision, we do not read the waiver in isolation, but rather consider it in the context of the contract as a whole. We hold only that, given the context in which the waiver appears and when the contract is read as a whole, the class-action waiver that SunTrust seeks to sever from its unenforceable jury trial waiver is, in fact, an integral part of that contractual clause, and, therefore, it cannot be severed. Specifically, the class-action waiver appears as the final sentence of the paragraph entitled "JURY TRIAL WAIVER" in SunTrust's 40-page single-spaced, fine print contract. The dispute resolution section of the contract clearly and independently identifies both the arbitration provision and the jury trial waiver as distinct applicable provisions. Both appear with distinct headings, distinct paragraphs, and distinct typeface separating those provisions from the surrounding text. Although SunTrust maintains that the class-action waiver was intended to be a stand alone provision separate from the jury trial waiver, unlike the arbitration provision and the jury trial waiver, it was not independently identified or otherwise distinguished as a distinct type of waiver or a distinct rule of litigation. The class-action waiver also appears in the same typeface as the jury trial waiver. It was not separated from the jury trial waiver by indentation, numbers, or characters. Nor is it otherwise written or displayed in such a way that it can reasonably be construed as an independent and distinct part separate from the jury trial waiver. Rather, when read as a whole,

it is clear that the class-action waiver was intended to be read in conjunction with the jury trial waiver. *Wilson v. Clark Atlanta University, Inc.*, 339 Ga. App. 814, 834 (2) (c) (794 SE2d 422) (2016) (citation and punctuation omitted) ("[W]ords [in a contract], like people, are judged by the company they keep.").

In other words, as we noted in our decision, the jury trial waiver and the class action waiver when considered in context constitute a single, integrated provision. And, it is because we concluded that the class-action waiver is not a distinct part that it cannot be severed as "[t]he concept of severability refers to striking a distinct part [of a contract and allowing the remainder to stand], not to excising certain language contained in a single provision." *AMB Property*, 250 Ga. App. at 515 (footnote omitted). SunTrust asks us to rewrite or revise the contract by striking the invalid jury trial waiver, while enforcing separately the inextricably intertwined, integrated class-action waiver, which we cannot do. *Record Town*, 301 Ga. App. at 370 (3); *Fernandes*, 261 Ga. App. at 433 (1). Although SunTrust disagrees with our decision, nothing it has cited in its motion demonstrates that we have misapplied the law or that there is controlling authority[3] which would require a different judgment than that rendered. For these reasons, we deny the motion for reconsideration. See Court of Appeals Rule 37 (e) ("[R]econsideration shall be granted on motion only when it appears that the Court overlooked a material fact in the record, a statute, or a decision which is controlling authority and which would require a different judgment

[3] We have reviewed all of the authorities cited by SunTrust and find that none of them are squarely on point, such that they require a different judgment than that previously rendered.

from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority.").

APPENDIX E

SECOND DIVISION
MCFADDEN, P. J.,
ANDREWS AND RAY, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. http://www.gaappeals.us/rules

January 5, 2017

In the Court of Appeals of Georgia

A14A1780. BICKERSTAFF v. SUNTRUST BANK.

RAY, Judge.

In *Bickerstaff v. SunTrust Bank*, 299 Ga. 459 (788 SE2d 787) (2016) (*Bickerstaff II*), the Supreme Court of Georgia reversed our previous decision in *Bickerstaff v. SunTrust Bank*, 332 Ga. App. 121 (770 SE2d 903) (2015) (*Bickerstaff I*), and remanded the case to this Court with the direction that we address an alleged error of the trial court's which we had deemed moot in our earlier opinion. See *Bickerstaff II*, supra at 470 (3). Accordingly, we adopt the judgment of the Supreme Court as our own and reverse the trial court's decision. We address the remaining alleged error, as discussed more fully below, by remanding the case to the trial court.

Bickerstaff I involved a dispute between bank customer Jeff Bickerstaff, Jr., and SunTrust over whether the parties were required to arbitrate their disagreement over allegedly usurious bank card overdraft fees. *Bickerstaff I*, supra at 121-122. We affirmed the trial

court's denial of class certification. Id. The Supreme Court reversed. It found, inter alia, that

> that the terms of the arbitration rejection provision of SunTrust's deposit agreement do not prevent Bickerstaff's class action complaint from tolling the contractual limitation for rejecting that provision on behalf of all putative class members until such time as the class may be certified and each member makes the election to opt out or remain in the class. Accordingly, the numerosity requirement of OCGA § 9-11-23 (a) (1) for pursuing a class complaint is not defeated on this ground.

Bickerstaff II, supra at 470 (3). As noted above, the Supreme Court also directed us to address whether the trial court erred in failing to find that SunTrust was barred from enforcing its arbitration clause against putative class members other than Bickerstaff. See *Bickerstaff I*, supra at 131 (3).

On remand to this Court, Bickerstaff has filed a suggestion of mootness and request for immediate remand, arguing that the Supreme Court's determination that absent class members may reject arbitration by remaining in the class moots any need to determine whether SunTrust waived its right to compel arbitration, and that an opinion on this issue would be advisory. SunTrust responds that the issue is not moot, but is unripe for consideration because no class has been certified.

The trial court has not ruled on the issue of whether SunTrust waived a right to compel arbitration against putative class members other than Bickerstaff. We decline to address this in the first instance here, see

generally *Superior Roofing Co. of Ga., Inc. v. American Professional Risk Svcs., Inc.*, 323 Ga. App. 416, 423 (744 SE2d 400) (2013) and instead remand the matter to the trial court for determination, if necessary, if and when a class is certified.

Judgment reversed and case remanded with direction. McFadden, P. J., and Andrews, J., concur.

APPENDIX F

137 S.Ct. 571 (2016)

580 U.S. 1020

SUNTRUST BANK, petitioner,

v.

Ellen Rambo BICKERSTAFF.

No. 16-459

Supreme Court of United States.

December 5, 2016.

Petition for writ of certiorari to the Supreme Court of Georgia denied.

APPENDIX G

788 S.E.2d 787 (2016)

299 Ga. 459

BICKERSTAFF

v.

SUNTRUST BANK.

S15G1295.

Supreme Court of Georgia

Decided: July 8, 2016.

Jason James Carter, Steven Jason Rosenwasser, Michael Brian Terry, Joshua Ferber Thorpe, Bondurant, Mixson & Elmore, LLP, C. Ronald Ellington, James Benjamin Finley, The Finley Firm, P.C., for Appellant.

William N. Withrow, Jr., Jaime L. Theriot, Lindsey Bowen Mann, Troutman Sanders LLP, for Appellee.

Roy E. Barnes, John F. Salter, Jr., The Barnes Law Group, LLC, Roy M. Sobelson, William V. Custer, IV, Jennifer Burch Dempsey, Byran Cave LLP, Hardy Gregory, Jr., Carley, Gregory & Gregory, George H. Carley, Carley, Gregory & Gregory, William Joseph Sheppard, James Bates Brannon Groover, LLP, amici curiae.

BENHAM, Justice.

Appellee SunTrust Bank created a deposit agreement to govern its relationship with its depositors that permits an individual depositor to reject the agreement's mandatory arbitration clause by giving written notice by a certain deadline, containing certain identifying

information such as name and account number. SunTrust claims it drafted the arbitration clause in such a way that only an individual depositor may exercise this right to reject arbitration on his or her own behalf, thereby permitting that individual to file only an individual lawsuit against the bank. But SunTrust asserts that even if, as it has been determined here, the filing of a lawsuit prior to the expiration of the rejection of arbitration deadline operates to give notice of the individual plaintiff's rejection of arbitration, the complaint cannot be brought as a class action because the filing of a class action cannot serve to reject the arbitration clause on behalf of class members who have not individually given notice. Instead, SunTrust claims, its arbitration rejection clause is drafted in such a manner as to make it impossible for a class representative to act on behalf of class members in this lawsuit. We disagree.

Factual and procedural background

On July 12, 2010, Jeff Bickerstaff, Jr., who was a SunTrust Bank depositor, filed a complaint against SunTrust on behalf of himself and all others similarly situated alleging the bank's overdraft fee constitutes the charging of usurious interest.[1] At the time Bickerstaff opened his account, thereby agreeing to the terms of SunTrust's deposit agreement, that agreement included a mandatory arbitration provision. In response to the ruling of a federal court in an unrelated action finding the arbitration clause in SunTrust's deposit agreement was

[1] Mr. Bickerstaff passed away after certiorari was granted in this appeal, and this Court granted the motion to substitute his legal representative as the appellant in this case.

unconscionable under Georgia law,[2] and after Bickerstaff's complaint had been filed, SunTrust amended the arbitration clause to permit a window of time in which a depositor could reject arbitration by sending SunTrust written notification that complied with certain requirements. SunTrust had not notified Bickerstaff or its other customers of this change in the arbitration clause of the deposit agreement at the time Bickerstaff filed his complaint, but the complaint, as well as the first amendment to the complaint, was filed prior to the amendment's deadline for giving SunTrust written notice of an election to reject arbitration. It was only after Bickerstaff's complaint was filed that SunTrust notified Bickerstaff and its other existing depositors, by language printed in monthly account statements distributed on August 24, 2010, that an updated version of the deposit agreement had been adopted, that a copy of the new agreement could be obtained at any branch office or on-line, and that all future transactions would be governed by the updated agreement.

The section of the updated deposit agreement setting forth the arbitration agreement contained the right to reject provision which directed customers, in pertinent

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[2] *In re Checking Account Overdraft Litigation,* 734 F.Supp.2d 1279, 1292 (II) (E) and n. 15 (S.D. Fla. 2010), later overturned in *In re Checking Account Overdraft Litigation, MDL No. 2036,* 459 Fed.Appx. 855, 858-859 (III) (11th Cir. 2012). We note that after the Southern District of Florida opinion was issued, the United States Supreme Court ruled that a class action waiver in a contract arbitration clause is enforceable, and that the application of state law doctrine holding that such a waiver is unconscionable is pre-empted by the Federal Arbitration Act. *AT&T Mobility LLC, v. Concepcion,* 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

part, as follows:

> Right to reject arbitration agreement. You may reject this arbitration agreement provision and therefore not be subject to being required to resolve any dispute, controversy or claim by arbitration. To reject this arbitration agreement provision, you must send the Bank written notice of your decision so that we receive it at the address listed below by the later of October 1, 2010 or within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations along with your name, address, Account name, Account number and your signature and must be mailed to SunTrust Bank Legal Department, Attn: Arbitration Rejection, P.O. Box 2848, Mail Code 2034, Orlando, FL XXXXX-XXXX. This is the sole and only method by which you can reject this arbitration agreement provision.... You agree that our business records will be final and conclusive with respect to whether you rejected this arbitration agreement provision in a timely and proper fashion.

Bickerstaff was unaware of the arbitration rejection provision or its deadline until SunTrust filed a motion to compel arbitration on the first business day after the October 1, 2010, notice deadline. That motion was denied in an order finding Bickerstaff had substantially complied with the contract's arbitration rejection requirements when he supplied the required information to SunTrust in the pleadings filed by his attorney on his behalf prior to the notice deadline. On April 13, 2013, Bickerstaff moved

to certify a class of all Georgia citizens with a SunTrust deposit agreement who, from a date four years prior to the date Bickerstaff filed his complaint, had at least one overdraft of $500,00 or less resulting from an ATM or debit card transaction and paid an overdraft fee on that transaction. That motion was also denied.[3]

SunTrust appealed the order denying its motion to compel Bickerstaff to arbitrate his claim, and the Court of Appeals affirmed the trial court, finding that the information contained in the complaint filed by Bickerstaff's attorney substantially satisfied the notice required to reject arbitration. *Bickerstaff v. SunTrust Bank*, 332 Ga.App. 121 (1) (a), 770 S.E.2d 903 (2015). Bickerstaff appealed the order denying his motion for class certification, and in the same opinion the Court of Appeals affirmed that decision. Id. at 127(2). In considering Bickerstaff's appeal, the Court of Appeals held, in essence, that the contractual language in this case requiring individual notification of the decision to reject arbitration did not permit Bickerstaff to reject the deposit agreement's arbitration clause on behalf of other putative class members by virtue of the filing of his class action complaint. Id. at 129(2) (b). This Court granted Bickerstaff's petition for certiorari review.[4]

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[3] The deposit agreement also includes a jury trial waiver for all matters not submitted to arbitration that also stipulates that any such litigation is to proceed on an individual basis and not as part of a class action. Bickerstaff challenged the enforceability of this provision as being unconscionable and unenforceable at under Georgia law, but that challenge has not yet been addressed by the trial court and is not an issue in this appeal.

[4] SunTrust did not seek review of the Court of Appeals' ruling finding Bickerstaff substantially complied with the arbitration rejection

The requirements to obtain class certification are set forth in OCGA § 9-11-23 (a) and (b). "Under Georgia law, a case may proceed as a class action if all prerequisites of OCGA § 9-11-23 (a) are satisfied: numerosity, commonality, typicality, and adequacy, and if at least one ground of OCGA § 9-11-23 (b) is satisfied." *EarthLink, Inc. v. Eaves,* 293 Ga. App. 75, 76, 666 S.E.2d 420 (2008).[5] Here, the trial court analyzed only the issue of numerosity and found it was lacking in this case. The Court of Appeals affirmed, finding that pursuant to the terms of the deposit agreement, Bickerstaff could reject the arbitration agreement only for himself and not for any other depositor. Bickerstaff was deemed to have timely rejected the arbitration agreement for himself by filing his complaint prior to the deadline for notifying SunTrust of rejection of arbitration. But, the Court of Appeals opined, since Bickerstaff's complaint could not serve as notification of rejection of arbitration by any other depositor, the class consists of only one depositor and lacks numerosity for class certification. For reasons set forth below, we reverse.

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notice requirements by filing his complaint.

[5] OCGA § 9-11-23 (a) reads as follows:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> (1) The class is so numerous that joinder of all members is impracticable:
>
> (2) There are questions of law or fact common to the class;
>
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) The representative parties will fairly and adequately protect the interests of the class.

Legal analysis

1. *Application of the rule of tolling to contractual limitations*

As we have previously noted, "[m]any provisions of OCGA § 9-11-23 were borrowed from Federal Rule of Civil Procedure 23, and for this reason, when Georgia courts interpret and apply OCGA § 9-11-23, they commonly look to decisions of the federal courts interpreting and applying Rule 23." *Georgia-Pacific Consumer Products, LP v. Ratner*, 295 Ga. 524, 525(1) n.3, 762 S.E.2d 419 (2014). In the 1974 landmark decision in *American Pipe and Construction Co. v. Utah*,[6] the Supreme Court of the United States applied Rule 23 and held that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." Id. at 550, 94 S.Ct. 756. Accordingly, in *American Pipe*, the statute of limitation was tolled for all who made timely motions to intervene in the lawsuit after class certification was ultimately denied for failure to satisfy the requirement of numerosity. Id. at 552-553, 94 S.Ct. 756. In the case filed by Bickerstaff, it is undisputed that the purported class numbers at least 1,000, and SunTrust has stipulated that it is unfeasible for so many depositors with relatively small claims to bring such claims individually. The determinative issue is whether the filing of Bickerstaff's complaint, thereby signaling his rejection of the arbitration agreement, tolled the time in which the putative class members were required to notify SunTrust of their intent to reject arbitration. The answer is yes.

Both this Court and the Court of Appeals have ruled

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[6] 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).

that putative class representatives may satisfy certain conditions such as a limitation period for filing suit or making a claim on behalf of those class members who ratify the representatives' actions by remaining in the class after the class is certified. In *Schorr v. Countrywide Home Loans, Inc.*,[7] individual plaintiffs, who were mortgage borrowers, sought class certification for damages allegedly due the class members for the defendant lender's failure to comply with a statutory requirement to cancel a security deed, upon repayment of the loan, within the time set forth in the statute. This Court answered a certified question posed by the federal district court by holding that the named plaintiff in a class action could satisfy the pre-suit written demand requirement of the applicable Code section on behalf of putative class members. In *Barnes v. City of Atlanta*,[8] a group of plaintiffs, who were attorneys practicing law in that city, challenged the constitutionality of an occupational tax and sought tax refunds on behalf of a putative class of individuals pursuant to a statute that required exhaustion of administrative remedies by the taxpayer seeking a refund, including making a written claim prior to filing suit. This Court held that the named plaintiffs had satisfied those requirements for the class. The contractual notice requirements placed upon a depositor in this case do not preclude a class representative from acting on behalf of other depositors any more than the statutory requirements placed upon taxpayers precluded the *Barnes* class representatives from acting on behalf of other taxpayers. Indeed, the Court of Appeals has held that a class representative may

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[7] 287 Ga. 570, 697 S.E.2d 827 (2010).

[8] 281 Ga. 256, 637 S.E.2d 4 (2006).

satisfy contractual notice requirements. See *Resource Life Ins. Co. v. Buckner,* 304 Ga.App. 719, 727, 698 S.E.2d 19 (2010) (class certified in a case involving form credit life or credit disability insurance contracts that included a statement that unearned premiums would be refunded on written notice).

This Court, however, has never examined whether a party who files suit and seeks class certification may satisfy a contractual limitation period on behalf of absent class members. SunTrust argues no legal authority exists for the proposition that contractual deadlines become suspended by the filing of a class complaint. In fact, this issue has been addressed by other courts in cases involving disputes between passengers and cruise lines, and those courts held contractual deadlines may be tolled on behalf of putative class members by the filing of a class complaint. Both in cases applying federal class action law, as well as the law of at least one other state, courts have held that because the filing of a class action commences suit for the entire class for purposes of the statute of limitation, the same rule applies to a contractual period of limitation for filing suit or giving notice of a claim. See, e.g., *Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332 (11th Cir. 1984) (rejecting the argument that since plaintiffs had no authorization from other passengers, the suit seeking class certification filed by a small number of cruise line passengers did not operate as notice of a claim by the absent class members within a specified number of days as required by the ticket contract); *Freeman v. Celebrity Cruises, Inc.,* 1994 WL 689809 (S.D.N.Y. Dec. 8, 1994) (a contract requirement that a claim be filed with the defendant within a certain period of time is satisfied by the filing of a claim by the plaintiff in a class action); *Latman*

v. Costa Cruise Lines, N.V., 758 So.2d 699 (Fla. Dist. Ct. App. 2000) (rejecting the argument that as a prerequisite to maintaining a class action on behalf of passengers on a cruise line, every member of the class must submit a written claim within the limitation period contained on the ticket).

a. *Tolling the contractual limitation in this case does not violate Georgia contract law.*

SunTrust would have us exempt the application of such a rule to this case because it claims the terms of its deposit agreement specifically require individual action that can only be performed by the individual depositor. The arbitration clause states that "[y]ou may reject this arbitration agreement." In another part of the agreement, "You" is defined as "the owner of the account," and the agreement further states it is "not for the benefit of, and may not be enforced by, any third party." SunTrust asserts that permitting the attorney for a single depositor to reject arbitration on behalf of other depositors runs afoul of the plain language of the deposit agreement, and that permitting Bickerstaff to reject arbitration for other depositors with whom he is not in privity violates the substantive legal rights of these other parties by permitting the contract between SunTrust and these other depositors to be modified or altered by a stranger to the contract. But we are unconvinced by SunTrust's argument that a contractual deadline requiring individual action may not be suspended until the certification of a class (and the attendant opportunity of class members to opt out or remain bound by the result of the class action) when it is clear that deadlines imposed by statutes or regulations requiring individual action can be suspended by the filing of a class action. See *Schorr,*

supra (where the applicable statute required a pre-suit written demand for liquidated damages be filed by a claimant); *Barnes,* supra (requiring exhaustion of administrative remedies, including making a written claim, prior to filing suit for a tax refund). See also *American Pipe, supra* (even where the class ultimately was not certified, the statutory limitation period was tolled for all who made timely motions to intervene in the lawsuit once certification was denied).

In its analysis of this issue, the Court of Appeals focused on whether Bickerstaff was in privity with the putative class members so that he could toll the contractual limitation period for rejecting the arbitration clause, or whether he could act as a third party to do so. Finding that Bickerstaff was not in privity with the purported class members and was not authorized to act for the members as a third-party beneficiary of their accounts, the Court of Appeals concluded he could not reject the arbitration clause for anyone other than himself. *Bickerstaff, supra*, 332 Ga.App. at 131, 770 S.E.2d 903. But this faulty reasoning ignores the fact that the entire class action scheme is based upon the premise that a member of a class may act as a representative of the other purported class members. See OCGA § 9-11-23 (a). If a class is certified and the putative members are notified, as set forth in subsection (c), a member may opt out, pursuant to subsection (c) (2), after which the class representative no longer represents that party. That the SunTrust contract requires individual notification of rejection of arbitration does not mean that Bickerstaff cannot act as a representative for that purpose until such time as a class member may opt out of such representation. Georgia contract law provides that

contractual obligations may be performed by an agent, where personal skill is not required. OCGA § 13-4-20. Likewise, the law of agency provides generally that "[w]hatever one may do himself may be done by an agent...." OCGA § 10-6-5. As the Eleventh Circuit held with respect to proofs of claim filed on behalf of a class of claimants in a bankruptcy proceeding, "the representative in a class action is an agent for the class members." *In re Charter Co.*, 876 F.2d 866, 873 (11th Cir. 1989). A class action "is a device by which the representative is an agent for persons who have not appeared or given even tacit consent." *In re American Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988). The class representative is a putative agent who "keep[s] the case alive pending the decision on certification." Id.

We reject SunTrust's assertion that permitting Bickerstaff's rejection of arbitration to be applied to other depositors illegally permits Bickerstaff to abridge the contractual rights of others. The deposit agreement's arbitration clause grants the prevailing party the right to collect attorney fees and costs, and SunTrust points to the fact that those depositors who remain bound by the arbitration clause and do not reject it are thereby entitled to recover fees and expenses in the event they prevail in an arbitrated dispute. Contrary to SunTrust's assertion, Bickerstaff does not argue he can reject arbitration for other depositors and thereby abrogate this contractual right to recover fees *prior to class certification and the subsequent election by class members to remain in the class or opt out of it.* Again, Bickerstaff's complaint serves only to toll the contractual period for making such an election until such time as the class is certified, and does not improperly abridge the contractual rights of others.

Furthermore, courts routinely permit a putative class representative to seek a ruling invalidating contractual arbitration clauses prior to class certification. See, e.g., *Jackson v. Payday Fin., LLC,* 764 F.3d 765, 779 (7th Cir. 2014) (putative class representative obtained pre-certification ruling that arbitration provision is void); *Noohi v. Toll Bros., Inc.,* 708 F.3d 599, 614 (4th Cir. 2013) (putative class representative obtained pre-certification ruling that arbitration provision is unenforceable for lack of mutual consideration); *In re Checking Account Overdraft Litigation,* 84 F.Supp.3d 1345 (S.D. Fla. 2015) (putative class representative obtained pre-certification ruling that arbitration provision is unconscionable). Once a class is certified, such rulings bind class members who do not opt out, thereby affecting their contractual rights. Invalidating an arbitration clause is no more of an alteration of contract rights than exercising a contractual right to reject arbitration.[9]

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[9] SunTrust sets up a false dilemma — that in the interim between the filing of Bickerstaff's complaint and the time an election is made by a depositor (if a class is certified), it cannot know its own contractual rights with respect to its customers or know, for example, whether a dispute between the bank and a given depositor is governed by the arbitration clause or not. Practically speaking, if a depositor sues SunTrust and rejects SunTrust's demand to arbitrate on the ground that he or she timely rejected the arbitration clause at the time Bickerstaff's class action complaint was filed, then that depositor's election under the arbitration clause is obvious. By its terms, the contract's arbitration requirement also applies to the bank. Likewise, then, if the bank pursues a dispute with a depositor and files an arbitration claim against a customer and that customer responds by seeking dismissal on the ground that the customer rejects the arbitration clause, any uncertainty about the bank's rights based on the customer's rejection, or not, of the arbitration clause would appear to be resolved.

SunTrust notes that the arbitration rejection notice requirements involve more than simply meeting a deadline. It argues the terms of the contract must be enforced, and in this case that means in order to reject the arbitration clause each depositor must provide individual information: name, address, account name, account number, and the depositor's signature. But this is frequently the case in class action disputes, and yet this does not typically defeat the pursuit of the claim as a class action so long as the class plaintiff has met the prerequisites for filing suit. The *Barnes* case involved a demand for refund of taxes paid, and although it had already been determined that the tax was unconstitutional, claimants were nevertheless subject to administrative exhaustion requirements that called for the individual filing of a written claim for refund that provided information required by the taxing authority, as set forth in the governing statute. *Barnes, supra*, 281 Ga. at 257-258, 637 S.E.2d 4. Nevertheless, this Court applied the general principles of class actions which hold that the satisfaction of a precondition for suit by the class plaintiff typically avoids the necessity for each class member to satisfy the precondition individually. Id. at 258, 637 S.E.2d 4. Likewise, *Schorr* involved a demand for liquidated damages that, by statute, required the claimant to make a written demand upon the lender who allegedly owed the statutory damages. Again, this Court applied "the general rule allowing the named plaintiffs in a class action to satisfy preconditions for suit on behalf of the entire class." *Schorr, supra*, 287 Ga. at 573, 697 S.E.2d 827. What is important is that the named plaintiff's fulfillment of each precondition and the filing of the class action provide notice of "the nature of the suit, the governing law, and the extent of the class." Id. Compare *J.M.I.C. Life Ins. Co. v.*

Toole, 280 Ga.App. 372, 374-375 (1) (b), 634 S.E.2d 123 (2006) (where the statute on which the class plaintiff filed suit did not require pre-suit notice, filing the suit satisfied the notice requirement on behalf of the individual class representative, and the Court of Appeals went on to affirm the certification of the class) to the facts of this case in which it has already been determined that the filing of the lawsuit provided notice of Bickerstaff's rejection of arbitration.

Bickerstaff's lawsuit informs SunTrust of the nature and scope of the claim and provides it with the information necessary to frame a legal defense to the claim of usury. As to the extent of the class, the identity of customers who are putative class members, and the individual information required from a depositor who rejects arbitration, the record shows SunTrust stipulated that its business records are sufficient to identify the customers who were charged an overdraft fee during the relevant period by name, account number, address, and the dates and amounts of the fees charged.

b. *Tolling in this case does not illegally bind the putative class members to the class representative's decision to reject arbitration.*

The Court of Appeals further concluded that in order to satisfy the numerosity requirement, Bickerstaff "would have to legally bind class members to a rejection of the arbitration clause — at least until they opted out of the class itself once it was certified." *Bickerstaff, supra*, 332 Ga.App. at 130-131, 770 S.E.2d 903. But this analysis, based upon an assumption that a class cannot be certified unless Bickerstaff can legally bind putative class members before certification, thereby satisfying the numerosity

requirement, again demonstrates a fundamental misconception about the way class actions work. The entire scheme of class actions, as set forth in OCGA § 9-11-23, is that all putative class members benefit from the class representative's filing of the complaint just as if each member had filed the complaint himself or herself. See *In re American Reserve Corp., supra*. The Court of Appeals disregarded "those principles which apply generally in class actions, including that which permits a representative to act on behalf of an entire class" with respect to a precondition for filing suit. *Barnes*, *supra*, 281 Ga. at 258, 637 S.E.2d 4. The Court of Appeals itself correctly noted that Bickerstaff was acting for the class members only until such time as they chose whether or not to opt out of the class. In damages class actions such as this one brought pursuant to OCGA § 9-11-23 (b) (3), a putative class representative cannot bind class members before a class is certified and the members have the opportunity to opt out of the complaint. See OCGA § 9-11-23 (c) (2). It follows that in the interim, the filing of Bickerstaff's lawsuit simply serves to mark time and toll the contractual period of limitation for putative class members to elect to remain in the class or opt out of it after class certification. If a member opts out, he or she is not bound by Bickerstaff's decision to reject arbitration. The Court of Appeals' reliance upon *Standard Fire Ins. Co. v. Knowles*,[10] is misplaced. In that case, the Supreme Court held that a class plaintiff's jurisdictional amount stipulation could not bind absent class members to the amount in controversy prior to class certification. Here, Bickerstaff is not attempting to bind any other class member to rejection of arbitration prior to class

[10] ___ U.S. ___, 133 S.Ct. 1345, 185 L.Ed.2d 439 (2013).

certification, his class action complaint, in which he personally rejects arbitration, simply tolls the time in which the other putative class members may elect to opt out of the class action, or remain in it. A class member's decision to remain in the class after class certification and notification is what will serve as his or her own election to reject the arbitration clause.

In this case, both the trial court and the Court of Appeals deemed the filing of Bickerstaff's complaint, with respect to Bickerstaff himself, to have satisfied the contractual requirement that he reject the arbitration clause in writing within the required period of time and, given the information contained within his complaint, to have satisfied the other notice requirements such as name, address, and account number. We add that, applying the reasoning of the Supreme Court in *American Pipe* and subsequent decisions of this and other courts, the filing of Bickerstaff's complaint tolled the required time period for giving notice to SunTrust for all putative class members until a certification decision is made and the notified class members elect whether to opt out or remain in the class. See *American Pipe, supra*, 414 U.S. at 551, 94 S.Ct. 756. This preserves the numerosity issue for a determination of whether the total number of putative class members whose contractual conditions have been tolled meets the numerosity requirement of OCGA § 9-11-23 (a) (1). To hold otherwise — that the filing of the class action complaint tolls the required time period for giving notice of a claim or filing suit only for the named plaintiff — would defeat numerosity in many cases in which any sort of notice requirement exists. The concept of numerosity

applies to the number of *putative,* class members,[11] and does not require that the actual number of class members be determined before a class is certified. That Bickerstaff's rejection of the arbitration agreement by the act of filing his complaint does not bind others until the class is certified does not defeat numerosity.

2. *Relation back*

Assuming a class is certified in this case, as in any subsection (b) (3) class action, each class member will be notified and required to decide whether to opt out of the lawsuit. See OCGA § 9-11-23 (c) (2). At that point, each notified depositor will be exercising his or her own contractual right to reject, or not, the deposit agreement's arbitration clause. Bickerstaff will not be making that decision for the other depositors and thus will not be acting as a party to those depositors' contracts or as a person in privity with the other depositors, and will not be acting as a beneficiary of anyone else's deposit agreement. Any member of the certified class who remains and does not opt out of the class will be deemed to have brought suit at the same time Bickerstaff's complaint was filed, which was within the deadline for rejecting arbitration for existing depositors, the class Bickerstaff seeks to represent. See *Barnes, supra*, 281 Ga. at 257 (1), 637 S.E.2d 4.

Consistent with the law of agency, depositors who remain in the class will thereby ratify the filing of the complaint, and that ratification will relate back to the

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[11] William B. Rubenstein, Newberg on Class Actions § 3:13 (5th ed.) ("Generally, a plaintiff must show enough evidence of the class's size to enable the court to make commonsense assumptions regarding the number of putative class members." (Emphasis supplied.))

timely notice of rejection Bickerstaff made when he filed the complaint. See OCGA § 10-6-52. This is consonant with, and simply another aspect of, the tolling rule adopted by the Supreme Court in *American Pipe, supra*, whereby the commencement of class action satisfies the statute of limitation for all those who ultimately participate in the suit. As we have previously noted, in this case it is the class representative's timely notification of rejection of arbitration by filing the complaint that serves to toll the time for the remaining class members to give notice. And for those members who ratify the class representative's acts by remaining in the class, the complaint provides the necessary notice. It demonstrates the member's intent to sue SunTrust in a court of law and to reject the requirement to arbitrate the claim. Tolling and the notion of relation back are simply two sides of the same coin.

3. *Remaining enumeration of error*

In his remaining enumeration of error, Bickerstaff claims the Court of Appeals erred in failing to hold SunTrust is barred due to lack of assent and waiver from enforcing the deposit agreement's arbitration clause against all putative class members. In fact, the Court of Appeals did not address that ground for reversing the trial court because it deemed the issue to be moot as a result of its decision that class certification was properly denied. *Bickerstaff, supra*, 332 Ga.App. at 132 (3). Upon remand to the Court of Appeals, that alleged trial court error remains to be addressed.

Conclusion

For the reasons set forth in this opinion, we reverse. We hold the terms of the arbitration rejection provision of

SunTrust's deposit agreement do not prevent Bickerstaff's class action complaint from tolling the contractual limitation for rejecting that provision on behalf of all putative class members until such time as the class may be certified and each member makes the election to opt out or remain in the class. Accordingly, the numerosity requirement of OCGA § 9-11-23 (a) (1) for pursuing a class complaint is not defeated on this ground.

Judgment reversed and case remanded.

All the Justices concur.

APPENDIX H

SECOND DIVISION
ANDREWS, P. J.,
MCFADDEN and RAY, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. http://www.gaappeals.us/rules/

March 30, 2015

In the Court of Appeals of Georgia

A14A1780. BICKERSTAFF v. SUNTRUST BANK.

A14A1781. SUNTRUST BANK v. BICKERSTAFF.

RAY, Judge.

These companion cases arise from a dispute between SunTrust Bank and one of its customers, Jeff Bickerstaff, Jr., over whether the parties must arbitrate their disagreement over what Bickerstaff contends are usurious bank card overdraft fees. In Case No. A14A1780, Bickerstaff argues that the trial court erred in denying his motion for certification of a class of SunTrust customers who also were charged the fees and in failing to find that SunTrust was barred from enforcing its arbitration provision as to the putative class. In Case No. A14A1781, SunTrust argues that the trial court erred in denying its motion to compel arbitration. For ease of analysis, we will address Case No. A14A1781 first and Case No. A14A1780 last. As detailed below, we affirm in both cases.

Bickerstaff opened a personal checking account with SunTrust in 2009, after agreeing to the bank's Rules and

Regulations for Deposit Accounts, which included a mandatory arbitration provision. In May 2010, in a case not involving Bickerstaff, a federal court determined that SunTrust's mandatory arbitration provision was substantively and procedurally unconscionable under Georgia law. See *In re Checking Account Overdraft Litigation*, 734 F.Supp.2d 1279, 1292 (II) (E) and n. 15 (S.D. Fla. 2010), later overturned in *In re Checking Account Overdraft Litigation, MDL No. 2036*, 459 Fed.Appx. 855, 858-859 (III) (11th Cir. 2012) (finding the arbitration clause conscionable). Approximately one month after the initial federal decision, in June 2010, SunTrust amended its arbitration agreement to allow customers a window of time in which to opt out of arbitration if they sent SunTrust written notice that complied with various requirements. Customers such as Bickerstaff had to opt out by October 1, 2010.

However, despite revising the amendment in June 2010, SunTrust did not actually give Bickerstaff or its other customers notice of this amendment until August 24, 2010. Nonetheless, on July 12, 2010, prior to any notice from SunTrust about the new opt-out provision and prior to the deadline for rejecting arbitration, Bickerstaff filed his complaint. He filed his amended complaint on August 9, 2010, also prior to any notice of the opt out provision and prior to the deadline.

Only after Bickerstaff had filed his complaint did SunTrust print the following non-specific language, which neither references the arbitration clause nor any deadline, in customers' August 2010 monthly account statements:

> An updated version of the 'Rules and Regulations for Deposit Accounts,' which governs your

> account, is now available and can be obtained at any branch office or at www.suntrust.com/rulesandregulations. All future transactions on your account will be governed by these updated rules and regulations.

(Capitalization omitted.) SunTrust then made the new version of the Deposit Agreement, which included the arbitration opt out and relevant dates, available at its branches and on its Web site. The opt-out provision directed customers to provide

> written notice of your decision so that we receive it at the address listed below by the later of October 1, 2010 or within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations along with your name, address, Account name, Account number and your signature and must be mailed to the SunTrust Bank Legal Department, Attn: Arbitration Rejection, P.O. Box 2848, Mail Code 2034, Orlando, FL 32802-2848. This is the sole and only method by which you can reject this arbitration agreement provision. . . . You agree that our business records will be final and conclusive with respect to whether you rejected this arbitration agreement provision in a timely and proper fashion.[1]

On the first business day after the opt-out deadline of October 1, 2010, SunTrust filed a motion to compel

[1] It is undisputed that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., governs the parties' agreement.

arbitration on October 4, 2010. It is undisputed that neither Bickerstaff nor his counsel knew about the opt-out provision and the October 1, 2010, deadline until SunTrust disclosed the information – after the opt-out had expired – in its motion to compel. The trial court, after a hearing, denied the motion. It is from that denial that the appeal in Case No. A14A1781 arises.

On April 13, 2013, Bickerstaff moved to certify a class of

> [e]very Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to the date the [c]ourt certifies the class, (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees.

The trial court denied the motion for class certification. The appeal in Case No. A14A1780 arises from this denial.

In the two orders on appeal, the trial court determined that the initial agreement bound Bickerstaff and all SunTrust's customers, and that the later amendment to the arbitration agreement was enforceable and was not unconscionable under Georgia law.

CASE NO. A14A1781

1. SunTrust argues that the trial court erred in denying its motion to compel arbitration by (1) finding that Bickerstaff effectively exercised his right to opt out by filing a lawsuit; (2) failing to consider SunTrust's business records regarding whether Bickerstaff timely and properly rejected the arbitration agreement; and (3)

finding that any failure on Bickerstaff's part to comply sufficiently with the opt-out provision was excused by what the trial court determined were SunTrust's own "misleading" actions in regard to the opt-out provision.[2]

The trial court denied SunTrust's motion to compel, reasoning that in filing his complaint, Bickerstaff had substantially complied with the opt-out provisions because all the information required "was communicated to or made readily available to SunTrust's legal department by [Bickerstaff's] pleadings" prior to the opt-out deadline. We agree.

Similar to our review of the grant or denial of a motion for summary judgment, which involves the elimination of all genuine issues of material fact, the standard of review from the grant or denial of a motion to compel arbitration is whether the trial court was correct as a matter of law. *Harris v. SAL Financial Svcs., Inc.*, 270 Ga. App. 230, 231

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[2] At the outset, we address Bickerstaff's motion to dismiss this appeal. Bickerstaff argues that because we initially granted SunTrust's interlocutory appeal on this matter, then later dismissed it as improvidently granted, that dismissal is either law of the case or res judicata on the issues now raised in A14A1781. First, this Court's dismissal was not an adjudication on the merits and is not res judicata. *Holmes v. Achor Center, Inc.*, 249 Ga. App. 184, 186-187 (1) (547 SE2d 332) (2001); *Henderson v. Justice*, 237 Ga. App. 284, 287 (1) (514 SE2d 713) (1999) (physical precedent only). See *American General Financial Svcs. v. Jape*, 291 Ga. 637, 644, n. 3 (732 SE2d 746) (2012), citing *Phillips Constr. Co. v. Cowart Iron Works*, 250 Ga. 488, 490 (299 SE2d 538) (1983) (recommending that "*trial courts*, except in the clearest cases, certify orders granting or denying such [motions to] stay judicial proceedings pending arbitration") (emphasis supplied). Further, the law of the case rule does not bar this appeal, as it applies only to decisions that resolve an issue, not to issues raised but never ruled upon. See *Shadix v. Carroll County*, 274 Ga. 560, 563 (1) (554 SE2d 465) (2001). Bickerstaff's motion to dismiss is denied.

(606 SE2d 293) (2004). "The construction of an arbitration agreement, *like any other contract*, presents a question of law, which is subject to de novo review." (Footnote omitted; emphasis supplied.) *Wells Fargo Auto Finance, Inc. v. Wright*, 304 Ga. App. 621, 621 (698 SE2d 17) (2010). The Supreme Court of Georgia has determined that "[t]he [C]ourt will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the arrangement of its words what its meaning is, will construe it accordingly." (Citation and punctuation omitted.) *Terry v. State Farm Fire & Casualty Ins. Co.*, 269 Ga. 777, 779 (2) (504 SE2d 194) (1998). "If the language of a contract is clear and unambiguous, the terms of the agreement are controlling and an appellate court should look no further to determine the intention of the parties." (Citation omitted.) *Id.* at 778-779 (2). "The general rule in determining contract compliance is substantial compliance, not strict compliance, and this rule applies to a contract's termination clause as well." (Citation and punctuation omitted.) *Del Lago Ventures, Inc. v. QuikTrip Corp.*, 330 Ga. App.138, 142 (1) (b) (764 SE2d 595) (2014); OCGA § 13-4-20. Here, the arbitration agreement's opt-out provision is equivalent to a termination clause. See generally *Macon Water Auth. v. City of Forsyth*, 262 Ga. App. 224, 225 (585 SE2d 131) (2003).

(a) SunTrust first argues that the trial court erred denying its motion to compel based on its allegedly erroneous finding that, by filing a lawsuit, Bickerstaff effectively opted out of the arbitration agreement. SunTrust essentially argues that Bickerstaff must strictly comply with the arbitration contract and that its filing of the lawsuit merely equates to "***no*** compliance[.]"

(Emphasis in original.) This is incorrect.

Although the arbitration agreement laid out specific requirements that Bickerstaff had to follow to terminate the arbitration agreement,

> [n]evertheless, substantial compliance is the general rule. Strict compliance is the exception, applying to cases concerning termination notices that result in forfeiture of real property rights under a lease or easement, or revocation of a surety. None of these circumstances are present here[.] . . . Moreover, *substantial compliance with notice provisions may suffice as long as the relevant information is communicated.*

(Citations and punctuation omitted; emphasis supplied.) *Del Lago Ventures, Inc.*, supra at 599 (1) (b). "As a rule, any notice requirement must be reasonably construed. And substantial compliance with a notice provision may present an issue for the [trier of fact] if the evidence appears to be 'in the spirit' of the contract provision." (Punctuation and footnote omitted.) *Western Surety Co. v. Dept. of Transp.*, 326 Ga. App. 671, 676 (1) (b) (757 SE2d 272) (2014). The key issue is whether SunTrust had actual notice of the information required by its opt-out clause, including Bickerstaff's intent to litigate rather than arbitrate. See *APAC-Georgia, Inc. v. Dept. of Transp.*, 221 Ga. App. 604, 606 (2) (472 SE2d 97) (1996).

The opt-out provision at issue required customers to reject arbitration by providing six pieces of information: (1) name; (2) address; (3) account name; (4) account number; (5) signature; and (6) a statement indicating the account holder was rejecting arbitration. The customer had to provide that information in three specific ways: (1)

in writing; (2) mailed to SunTrust's legal department at the Florida address listed above; (3) by October 1, 2010, or within 45 days of opening an account.

It is undisputed that the complaint and amended complaint are in writing, and although they were not mailed to the Florida address, they were successfully served upon SunTrust. Also, it is clear that SunTrust's legal department received them and retained outside counsel, who filed an answer prior to the opt-out deadline. When Bickerstaff filed his complaint, he provided his name; his county and state of residence and his attorneys' addresses; some transaction and overdraft dates and fee percentages related to his account, but no account number; and his attorney's signature. Obviously, the complaints indicated Bickerstaff's intention to litigate.

Further, the record shows that SunTrust had all the information required by the opt-out provision prior to the deadline. In an affidavit prepared in support of SunTrust's motion to compel arbitration and dated September 29, 2010 – *prior* to the October 1, 2010, opt-out deadline – a senior vice president at SunTrust listed Bickerstaff's account name and number and included as an exhibit Bickerstaff's signature card for the account. The affidavit provides that Bickerstaff "was notified by mail that an updated Deposit Agreement was available[,]"and references as an exhibit the account statement that contained the notice. That account statement includes Bickerstaff's address. Further, Bickerstaff's attorneys signed the complaint and amended complaint while acting on his behalf and as his agents.

SunTrust argues that "neither the complaint nor the amended complaint notified SunTrust that [Bickerstaff]

wished to opt out of the Arbitration Agreement in its entirety" and that Bickerstaff "could have filed the complaint with the intention of seeing whether SunTrust desired to have his asserted claims resolved by arbitration[,]" yet, in filing the complaint, Bickerstaff unconditionally sought to have the trial court decide these issues, not an arbitrator, necessarily meaning that he was opting out of the arbitration requirement. Further, both SunTrust's Answer and its Memorandum of Law in Support of its Motion to Compel Arbitration and Stay Action demonstrate that SunTrust clearly understood that Bickerstaff desired that *all* of his claims in litigation escape any requirement of arbitration.

Further, all the information required by the opt-out clause – including Bickerstaff's name, address, account name and number and intent to reject arbitration and litigate instead – was timely communicated to or was in SunTrust's possession in a way that substantially complied with the arbitration contract. The signature of Bickerstaff's counsel substantially complies with the signature requirement. See OCGA § 10-6-5 ("[w]hatever one may do himself may be done by an agent"). "Substantial compliance with notice provisions . . . may suffice so long as the contemplated information is communicated." (Footnote omitted.) *Wallick v. Period Homes, Ltd.*, 252 Ga. App. 197, 203 (3) (555 SE2d 863) (2001) (although a contract required written notice, denial of summary judgment to appellant was appropriate where jury could find that oral notice contained the requisite information). The trial court did not err.

(b) SunTrust argues that the trial court erred in failing to consider the bank's business records on the issue of whether Bickerstaff timely and properly rejected the

arbitration agreement. SunTrust provides no record citation showing where this argument was raised below or properly preserved for our review, nor does SunTrust cite to any authority in support of its argument, which is not properly presented as a separate enumeration of error in contravention of our Rule 25 (a) (1), (3) and (c) (1), (2). This enumeration is deemed abandoned.

(c) Because of our determination in Division 1 (a) of Case No. A14A1781, we need not reach SunTrust's remaining enumeration of error.

CASE NO. A14A1780

2. Bickerstaff argues that the trial court erred in denying his motion for class certification and in failing to find that SunTrust was barred from enforcing its arbitration clause against customers other than Bickerstaff.

On review of an order denying class certification, "we will consider the factual findings as adopted by the trial court and affirm them unless clearly erroneous, and we will review the conclusions of law for an abuse of discretion." (Punctuation and footnote omitted.) *American Debt Foundation, Inc. v. Hodzic*, 312 Ga. App. 806, 808 (720 SE2d 283) (2011). Bickerstaff bears the burden of showing that certification is appropriate. Id.

To obtain class certification, the plaintiffs are required to satisfy all four pre-requisites set forth in OCGA § 9-11-23 (a), and at least one factor in OCGA § 9-11-23 (b). *American Debt. Foundation*, supra. OCGA § 9-11-23 provides:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only

> if: (1)The class is so *numerous* that joinder of all members is impracticable; (2)There are questions of law or fact *common* to the class; (3)The claims or defenses of the representative parties are *typical* of the claims or defenses of the class; and (4)The representative parties will *fairly and adequately protect the interests* of the class.

(Emphasis supplied.) The failure of any one of the OCGA § 9-11-23 factors is sufficient to defeat class certification. *Diallo v. American InterContinental Univ., Inc.*, 301 Ga. App. 299, 306 (3) (687 SE2d 278) (2009). Here, the trial court's order analyzed only the numerosity factor, finding that although Bickerstaff effectively opted out of the agreement for himself by filing suit, he could not do so on behalf of the class; thus, as a class of one, he failed to meet the numerosity requirement.

Bickerstaff argues that the trial court erred in denying his motion for class certification. We find no grounds for reversal.

(a) Bickerstaff argues that in rendering its decision, the trial court erred in applying the federal presumption favoring arbitration. Specifically, he contends that the trial court mistakenly relied on that presumption "in determining the *existence* of an agreement to arbitrate," and that the presumption only applies when determining the *scope* of an agreed-upon arbitration clause. (Emphasis supplied.) SunTrust counters that the trial court "only referenced federal policy favoring arbitration[,]" which is taken into consideration when applying ordinary State law.

Here, the trial court determined that the SunTrust customers in Georgia who were assessed overdraft fees

during the relevant time period were subject to an enforceable arbitration agreement. Thus, the arbitration amendment did not change the binding nature of the agreement unless and until putative class members had exercised their right to opt-out or the trial court had determined that Bickerstaff could opt out on their behalf.

As the Eleventh U.S. Circuit Court of Appeals stated in *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1116 (II) (B), n. 5 (11th Cir. Fla. 2014),

> the federal policy favoring arbitration is taken into consideration even in applying ordinary [S]tate law. The federal policy favoring arbitration is not, however, the same as applying a presumption of arbitrability. We only apply the presumption of arbitrability to the interpretation of contracts if we have already determined that, under [S]tate law, the parties formed a valid agreement to arbitrate.

(Citation and punctuation omitted.) Pretermitting which standard the trial court used, we will affirm its denial of class certification if right for any reason. *Ardis v. Fairhaven Funeral Home & Crematory, Inc.*, 312 Ga. App. 482, 484, n. 1 (718 SE2d 843) (2011).

(b) Bickerstaff next argues that the trial court erred in determining that he was not empowered to reject arbitration on behalf of the class prior to certification.

The trial court, in denying SunTrust's motion to compel arbitration, essentially determined that the arbitration agreement was not enforceable as to Bickerstaff because he had successfully opted out. In its denial of class certification, the trial court analyzed

whether the arbitration contract itself permitted Bickerstaff to opt out on behalf of others.

Under 9 U.S.C. § 2,

> [a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

This provision reflects

> both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract. In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms. The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses["] . . . but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

(Citations and punctuation omitted.) *AT&T Mobility,*

LLC v. Concepcion, __ U. S. __ (131 S.Ct. 1740, 1745-1746 (II), 179 LE2d 742) (2011). See *Dasher*, supra. "Whether there is a valid agreement to arbitrate is generally governed by state law principles of contract formation, and is appropriate for determination by the court." (Citation omitted.) *Triad Health Mgt. of Ga., III, LLC v. Johnson*, 298 Ga. App. 204, 206 (2) (679 SE2d 785) (2009).

Here, each of the members of the putative class, like Bickerstaff, presumably signed his or her own individual Deposit Agreement contract with SunTrust, which contains the arbitration provision. The Deposit Agreement provides that

> [t]hese rules and regulations constitute a contract between *you* and the Bank. . . . *This agreement is for the benefit of, and may be enforced only by, you* and the Bank and their respective successors and permitted transferees and assignees, and *is not for the benefit of, and may not be enforced by, any third party*.

(Emphasis supplied.) The agreement also provides that

> *[y]ou* may reject this arbitration agreement provision[.] . . . To reject this arbitration agreement provision, *you* must send the Bank written notice of *your* decision[.] . . . This arbitration agreement provision will apply to *you* and us and to your Account unless *you* reject it by providing proper and timely notice as stated herein.

(Emphasis supplied.) The agreement defines "you" and "your" as the "[d]epositor[,]" which "means the owner of the Account and each person who signs the signature card

for the Account or is referenced on the Bank's records as an owner of the Account." Bickerstaff does not argue, nor do we find, any evidence that any member of the putative class is a joint signatory on Bickerstaff's account, or a successor, transferee, or assignee. However, Bickerstaff now proposes to alter the arbitration contracts of the putative class.

In general, "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." (Citations omitted.) *The Standard Fire Ins. Co. v. Knowles*, __ U. S. __ (133 S.Ct. 1345, 1349 (II), 185 LE2d 439) (2013). In order to opt out on a pre-suit basis to satisfy the numerosity requirement, Bickerstaff would have to legally bind class members to a rejection of the arbitration clause – at least until they opted out of the class itself once it was certified. This he cannot do. Further, the Deposit Agreement contract and its arbitration clause prohibit Bickerstaff from altering others' contracts where he is neither a party nor in privity with a party.

"[T]he construction of a contract is a question of law for the court that is subject to de novo review. Where contract language is unambiguous, construction is unnecessary, and the court simply enforces the contract according to its clear terms." (Footnote omitted.) *Losey v. Prieto*, 320 Ga. App. 390, 390-391 (739 SE2d 834) (2013). See also 9 U.S.C. § 2. Here, the contract terms are plain: Bickerstaff was not a privy nor a party to any contract between SunTrust and putative class members, and each individual account holder had to opt out for himself or herself. Nor were Bickerstaff or the putative class members beneficiaries of one another's contracts with SunTrust such that Bickerstaff could enforce or alter

those contracts. See *Walls, Inc. v. Atlantic Realty Co.* 186 Ga. App. 389, 390-392 (1) (367 SE2d 278) (1988) (where indemnification contract specifically provided that the contract was solely for the benefit of the signatories, there could be no third-party beneficiaries). See also *Southeast Grading, Inc. v. City of Atlanta*, 172 Ga. App. 798, 800 (1) (324 SE2d 776) (1984) (for a third party to have standing to enforce a contract under OCGA § 9-2-20, the contract must clearly show it was intended for the third party's benefit). The contract language clearly states that the agreement "is not for the benefit of, and may not be enforced by, any third party." "Given this explicit language, the intent of the parties that no others benefit from the [arbitration opt-out provision] could scarcely have been more clearly and unambiguously expressed." (Citation omitted.) *Kaesemeyer v. Angiogenix, Inc.*, 278 Ga. App. 434, 437 (1) (629 SE2d 22) (2006) (finding that third party could not benefit from contract containing this language: "no other person shall have any right, benefit or obligation under this Agreement as a third party beneficiary or otherwise") (punctuation omitted).

The cases Bickerstaff cites for the proposition that plaintiffs may satisfy preconditions for suit in a class action are distinguishable, and do not demand or even recommend a different result, because none of them implicate the type of contractual language at issue here. See *Schorr v. Countrywide Home Loans, Inc.*, 287 Ga. 570, 570-571, 573 (697 SE2d 827) (2010), *Barnes v. City of Atlanta*, 281 Ga. 256, 257-258 (637 SE2d 4) (2006), *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 374 (1) (a) (634 SE2d 123) (2006) (all involved statutory language that did not require each individual to act for himself or herself); and *Resource Life Ins. Co. v. Buckner*, 304 Ga. App. 719,

720, 726-728 (1) (698 SE2d 19) (2010) (named plaintiff could provide written notice on behalf of other insureds where, inter alia, appellate court found that where insurance policy made refunds contingent on written notice provided "either by or *on behalf of* the insured," and where written notice was not a condition precedent to a claim) (emphasis supplied).

Two cases applying the law of other jurisdictions also address the issue, but they are not binding authority and make no factual findings about whether there were contractual provisions, as in the instant case, that specifically limit action under the contract to the parties. Compare *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1336-1337 (11th Cir. 1984) and *Latman v. Costa Cruise Lines, N.V.*, 758 So.2d 699, 704 (IV) (Fla. Dist. Ct. App. 2000) (both allowing named plaintiff, a cruise line passenger, to provide contractual notice on behalf of other passengers).

Here, the contractual language itself prohibits Bickerstaff from opting out on behalf of others. Thus, as the trial court determined, he cannot satisfy the numerosity requirement of OCGA § 9-11-23. Because of this, we need not analyze the remaining factors. We affirm the trial court.

3. Bickerstaff's final enumeration appears to argue that – independent of Bickerstaff himself – the trial court erred in finding that the arbitration agreement was enforceable as to all other affected SunTrust customers standing alone because they never assented to the agreement and because SunTrust by its own conduct waived its right to require timely compliance with the opt-out provision. Our decision in Division 2 affirming the trial

court's denial of class certification moots this contention, as we have no ability to analyze claims of nonparties unconnected to Bickerstaff's own. See *Standard Fire*, supra at 1349 (II).

Judgment affirmed. McFadden, J., concurs and Andrews, P. J., concurs in judgment only.

APPENDIX I

Georgia State Court.

Fulton County

Jeff BICKERSTAFF, Jr., on behalf of himself and all persons similarly situated, Plaintiff,

v.

SUNTRUST BANK, Defendant.

No. 10-EV-010485-D.

February 19, 2014.

Order Denying Plaintiff's Motion for Class Certification

Susan E. Edlein, Judge.

Before the Court is Plaintiff's Motion for Class Certification ("Motion"). This Motion has been the subject of extensive briefing by both parties and the Court has heard oral argument from counsel. Having considered the Motion, Defendant SunTrust Bank's ("SunTrust") response in opposition thereto, the arguments of counsel, all other pleadings and matters of record, and for other good cause shown, the Court finds as follows:

BACKGROUND

I. Plaintiff's Sun Trust Account

On February 2, 2009, Plaintiff Jeff Bickerstaff, Jr. opened a personal checking account with SunTrust. (Triplett Aff. ¶ 4). As a condition to opening the account, Plaintiff, like all SunTrust customers, was bound by SunTrust's Rules and Regulations for Deposit Accounts ("Rules and Regulations"). (Triplett Dep. at 14-15). The

Rules and Regulations covered 40 pages and were drafted by SunTrust. (Triplett Aff. ¶¶ 5-6, Exh. B; Triplett Dep. at 14-15).

When Plaintiff opened his account, the Rules and Regulations included a mandatory arbitration provision pursuant to which Plaintiff and SunTrust were required, with the exception of certain Excluded Claims or Proceedings, to submit any disputes or claims "concerning, arising out of or relating to the Account" to binding arbitration. (hereinafter "Arbitration Agreement") (Triplett Aff. Exh. B at 22). The Arbitration Agreement includes a class action waiver that provides that:

> Notwithstanding any other provision to the contrary, if either you or we elect to arbitrate a Claim, neither you nor we will have the right: (a) to participate in a class action in court or in arbitration, either as a class representative, class member or class opponent; or (b) to join or consolidate Claims with claims of any other persons. No arbitrator shall have authority to conduct any arbitration in violation of this provision.
>
> The parties to these [R]ules and [R]egulations acknowledge that the waiver of class actions is material and essential to the arbitration of any disputes between the parties and is nonseverable from this agreement to arbitrate a Claim. If the waiver of class actions is limited, voided or found unenforceable, then the parties' agreement to arbitrate (except for this sentence) shall be null and void with respect to such proceeding, subject

> to the right to appeal the limitation or invalidation of the waiver of class actions. The parties acknowledge and agree that under no circumstances will a class action be arbitrated.

(*Id.* at 23).

The Rules and Regulations also included a class action and jury trial waiver:

> **JURY TRIAL WAIVER.** FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HERE OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. FURTHER DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

(*Id.* at 24) (hereinafter "Litigation Class Action Waiver").

SunTrust changed the Rules and Regulations, allowing its customers the ability to opt out of arbitration. First, on October 1, 2009, SunTrust changed the Rules and Regulations to include a provision allowing new customers to reject and opt out of the Arbitration Agreement within 45 days of opening their accounts. (Triplett Aff. ¶ 6, Exh. C at 22-23; Triplett Dep. at 17-18).

This provision read as follows:

> **Right to Reject Arbitration Agreement.** You may reject this arbitration agreement provision and therefore not be subject to being required to resolve any dispute, controversy or claim by arbitration. To reject this arbitration agreement provision, you must send [SunTrust] written notice of your decision so that we receive it at the address listed below within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations along with your name, address, Account name, Account number and your signature and must be mailed to the SunTrust Bank Legal Department, Attn: Arbitration Rejection, P.O. Box 2848, Mail Code 2034, Orlando, FL 32802-2848. This is the sole and only method by which you can reject this arbitration agreement provision. Rejection of this arbitration agreement provision will not affect any remaining terms of these rules and regulations and will not result in any adverse consequence to you or your Account. You agree that our business records will be final and conclusive with respect to whether you rejected this arbitration agreement provision in a timely and proper fashion. **This arbitration agreement provision will apply to you and us and to your Account unless you reject it by providing proper and timely notice as stated herein.**

(Triplett Aff. Exh. C at 22-23).

Eight months later, on June 1, 2010, SunTrust changed the opt-out provision to extend the right to reject and opt out of the Arbitration Agreement to existing customers. (Triplett Aff. at ¶ 6, Exh. D at 23; Triplett Dep. at 17-18). Customers had the right to opt out of arbitration by the later of October 1, 2010 or within 45 days of opening their accounts. The revised opt-out provision read as follows:

> **Right to Reject Arbitration Agreement.** You may reject this arbitration agreement provision and therefore not be subject to being required to resolve any dispute, controversy or claim by arbitration. To reject this arbitration agreement provision, you must send [SunTrust] written notice of your decision so that we receive it at the address listed below by the later of October 1, 2010 or within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations along with your name, address, Account name, Account number and your signature and must be mailed to the SunTrust Bank Legal Department, Attn: Arbitration Rejection, P.O. Box 2848, Mail Code 2034, Orlando, FL 32802-2848. This is the sole and only method by which you can reject this arbitration agreement provision. Rejection of this arbitration agreement provision will not affect any remaining terms of these rules and regulations and will not result in any adverse consequence to you or your Account. You agree that our business records will be final and conclusive with respect to whether you rejected

> this arbitration agreement provision in a timely and proper fashion. **This arbitration agreement provision will apply to you and us and to your Account unless you reject it by providing proper and timely notice as stated herein.**

(Triplett Aff. Exh. D at 23).

II. The Present Litigation

On July 12, 2010, Plaintiff filed his Complaint in this case alleging that, pursuant to SunTrust's automated overdraft program for bank cards, between February 2, 2009 and April 4, 2010, he was on more than one occasion charged with overdraft fees. (Compl. at ¶ 89). Plaintiff contends that these overdraft fees amount to interest charges that exceed Georgia's civil and criminal usury limits. (*Id.* at ¶¶ 14, 85-100). Plaintiff asserts claims for: (1) violation of Georgia's civil usury laws, O.C.G.A. § 7-4-2; (2) violation of Georgia's criminal usury laws, O.C.G.A. § 7-4-18; (3) conversion; and (4) money had and received. (First Am. Compl. at ¶¶ 16, 87-119).[1]

SunTrust filed a Motion to Compel Arbitration and Stay Action, which was denied by the Court on March 16, 2012. In denying SunTrust's Motion, the Court rejected Plaintiff's contention that the Arbitration Agreement was unconscionable, but found that, by filing this lawsuit, Plaintiff had effectively exercised his contractual right to opt out of arbitration. Notably, this Court specifically left open the issue of whether Plaintiff had opted out, or could opt out, of the Arbitration Agreement on behalf of the purported class. (3/16/12 Order at 18 n.8).

That issue is now before the Court, however, by virtue

[1] Plaintiff filed a First Amended Complaint on August 9, 2010.

of Plaintiff's present Motion, seeking certification, pursuant to O.C.G.A. 9-11-23(b)(3), of a class of Georgia citizens who paid overdraft charges on debit or ATM overdrafts to SunTrust of $500.00 or less.[2] Although none of the other putative class members took steps to opt out of arbitration, (Hernandez Aff. ¶ 8), Plaintiff argues that class certification is appropriate because his "opt out" of arbitration was effective not just for himself but for all the other members of the proposed class. Plaintiff further argues that the Litigation Class Action Waiver is unconscionable under Georgia law and therefore unenforceable.

SunTrust responds that Plaintiff did not and could not opt out of arbitration on behalf of all the members of the proposed class, that the Litigation Class Action Waiver is enforceable, and that the class does not satisfy the requirements of Rule 23. SunTrust also filed Motion to Compel Arbitration of Claims of Class Members.

ANALYSIS

"Under OCGA § 9-11-23, a class action is authorized if the members of the class share a common right and common questions of law or fact predominate over individual questions of law or fact." *J.M.I.C. Life Ins. Co. v. Toole,* 280 Ga. App. 372, 375, 634 S.E.2d 123 (2006) (citation omitted). "The nature of the right to be enforced

[2] Plaintiff's Motion requests that the Court certify a class of "[e]very Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to the date the Court certifies the class, (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund a refund of those Fees. (Pl. Br. In Support of Mot. for Class Certification at 6).

may be in common, though the facts as to each member of the alleged class may be different." *Id.* In order to certify a class, the Court must determine that the proposed class meets the following requirements:

> (1) numerosity — that the class is so numerous as to make it impracticable to bring all members before the court; (2) commonality — that there are questions of law and fact common to the class members which predominate over any individual questions; (3) typicality — that the claim of the named plaintiff is typical of the claims of the class members; (4) adequacy of representation — that the named plaintiff will adequately represent the interest of the class; and (5) superiority — that a class action is superior to other methods of fairly and efficiently adjudicating the controversy.

Id. at 375-76, 634 S.E.2d 123; O.C.G.A. § 9-11-23(a), (b)(3).

Considering these factors, the Court finds that the numerosity requirement is dispositive. Although it has been stipulated that over 1,000 SunTrust customers in Georgia have been assessed an overdraft fee during the relevant time period, (Stipulation attached as Exh. 1 to Pl.'s Reply in Support of Mot. for Class Certification at ¶ 3), numerosity, in this Court's view, turns on whether these customers are subject to an enforceable arbitration agreement. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.5 (11th Cir. 1987) (recognizing that "presence of arbitration agreements is relevant" to the numerosity requirement of Rule 23(a)(2) and directing district court to determine whether potential class members not subject to arbitration would be sufficient to satisfy the numerosity requirement). Because the Court

finds that they are subject to an enforceable arbitration agreement, class certification is inappropriate.

On this issue, Plaintiff's position is that the members of the putative class are not subject to an enforceable arbitration agreement, because he effectively opted out of the Arbitration Agreement on their behalf when he filed his class action complaint. SunTrust responds that each putative class member is still subject to the Arbitration Agreement (which it intends to enforce) because none of them exercised their contractual right to opt out of the Arbitration Agreement and because Plaintiff, as a stranger to the contractual relationship between SunTrust and the other putative class members, did not have legal authority to exercise the opt-out right on their behalf.

As a general matter, "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." *The Standard Fire Ins. Co. v. Knowles,* 133 S. Ct. 1345, 1349, 185 L. Ed. 2d 439 (2013) (citation omitted). Relying on the cases of *Barnes v. City of Atlanta,* 281 Ga. 256, 637 S.E.2d 4 (2006), *Schorr v. Countrywide Home Loans, Inc.,* 287 Ga. 570, 697 S.E.2d 827 (2010), and *Resource Life Ins. Co. v. Buckner,* 304 Ga. App. 719, 698 S.E.2d 19 (2010), Plaintiff urges that a class representative is nevertheless authorized to take certain pre-certification and pre-suit actions on behalf of a class and that opting out of arbitration is a pre-suit action that he, as the class representative, can take on behalf of all class members. For the reasons set forth below, the Court does not agree.

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, governs the arbitration agreements between the

various putative class members and SunTrust. Importantly, and as the Court noted in its March 16, 2012 Order, under the FAA, written agreements to arbitrate a dispute arising out of a transaction involving interstate commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision reflects "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract[.]" *AT&T Mobility LLC v. Conception,* 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011) (citations omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms[.]" *Id.* (citations omitted).

In construing arbitration agreements, "the court should apply 'ordinary state-law principles that govern the formation of contracts." ' *Johnson v. Circuit City Stores, Inc.,* 148 F.3d 373, 377 (4th Cir. 1998) (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S. Ct. 1920 (1995)); *see also, Triad Health Mgmt. of Ga., III, LLC v. Johnson,* 298 Ga. App. 204, 206, 679 S.E.2d 785 (2009) ("Whether there is a valid agreement to arbitrate is generally governed by state law principles of contract formation, and is appropriate for determination by the court."). As the United States Supreme Court has instructed, however, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S. Ct. 927 (1983). Pursuant to that liberal policy, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at

hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25, 103 S. Ct. 927; *see also Conception*, 131 S. Ct. at 1749 ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as embodying a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary [.]") (internal citations and quotations omitted).

In light of the policy of enforcing arbitration agreements according to their terms and the explicit contractual language at issue, the Court concludes that Plaintiff did not, by filing this lawsuit, effectively opt out of arbitration on behalf of the over 1,000 SunTrust account holders who would be part of this putative class. To rule otherwise would be contrary to the plain language of the Arbitration Agreement which does not specifically grant a customer the ability to opt out of the Arbitration Agreement on behalf of anyone other than themselves, and, rather, requires strict compliance with the opt-out provision. It would also be contrary to the federal policy favoring arbitration.

The cases relied on by Plaintiff do not require a different result. In *Barnes*, the plaintiffs brought a putative class action challenging a city tax on lawyers and seeking a refund of taxes paid. 281 Ga. at 256, 637 S.E.2d 4. The relevant statutory law required exhaustion of certain administrative remedies, and specifically, the assertion of a pre-litigation claim for a refund. *Id.* at 257-58, 637 S.E.2d 4. The Georgia Supreme Court held that the pre-suit actions by the named class representative

were sufficient to fulfill the purposes of the exhaustion of remedies requirement - to provide the defendant with notice of the claims and the opportunity to budget for such a contingency. *Id.* at 256-59, 637 S.E.2d 4. The Court noted that the relevant statute neither prohibited utilization of a class action nor expressly required individual exhaustion of administrative remedies. *Id.* at 258, 637 S.E.2d 4.

In *Schorr,* the plaintiff brought a class action suit to recover statutory liquidated damages for a grantee's failure to cancel a security deed. 287 Ga. at 570-71, 697 S.E.2d 827. The Georgia Supreme Court held that a class representative's pre-suit written demand satisfied the statutory pre-suit written demand requirement for liquidated damages for the entire class. *Id.* at 570-73, 697 S.E.2d 827. The Supreme Court relied on the statutory language upon which the lawsuit was predicated, finding that it did "not provide for the form of the action to be utilized." *Id.* at 571, 697 S.E.2d 827. The Court explained that:

> By participating as a plaintiff in a class action that includes a claim for liquidated damages, a grantor of a security deed is unquestionably bringing an action for liquidated damages, which is what the statute permits. Thus, any such grantor whom the named plaintiffs represent and who does not ultimately opt out of the class action is considered to have brought suit for liquidated damages at the same time as the named plaintiffs.

Id. Citing to *Barnes,* the Supreme Court once again noted that there may be exceptions to an individual providing pre-suit notice on behalf of a class such as a statutory

prohibition of a class action or an express requirement that individuals satisfy the condition precedent. *Id.* at 573, 697 S.E.2d 827.

In *Resource Life Ins. Co. v. Buckner*, the plaintiff sued the defendant insurance company individually and on behalf of a purported class after the defendant allegedly failed to refund unearned insurance premiums owed under credit life or credit disability policies. 304 Ga. App. at 719, 698 S.E.2d 19. Although the relevant statutory law required the refund of an unearned premium, the policies made such a refund contingent on receipt of written notice that the insured was owed a refund. *Id.* at 726-28, 698 S.E.2d 19. The defendant unsuccessfully moved for summary judgment on the issue of written notice, arguing that it was not obligated to refund unearned premiums unless and until it received written notice and that such written notice was a condition precedent to any class member's assertion of a claim. *Id.* The Georgia Court of Appeals rejected these arguments, relying in part on the rule that a notice provision in an insurance contract is not considered a condition precedent, unless explicitly stated in the policy. *Id.* at 727-28, 698 S.E.2d 19. The policies did not contain an express stipulation that either (1) failure to provide written notice would result in forfeiture of the premiums or (2) that written notice was a condition precedent. *Id.* at 727, 698 S.E.2d 19. Consequently, the Court held that the filing of the class action complaint was sufficient to provide the defendant with the requisite notice as to the claims of the putative class members. *Id.*

None of these cases involve arbitration agreements and the accompanying liberal federal policy favoring arbitration. As such, they provide no authority for ignoring the plain language of the Arbitration Agreement

and allowing Plaintiff to opt out of arbitration on behalf of over 1,000 other customers, thereby depriving SunTrust of its contractual right to demand arbitration of the claims of those customers.

This is particularly true because, unlike the statutory and contractual language at issue in the cases relied on by Plaintiff, the Arbitration Agreement provides the specific, and only, method by which an account holder can opt out of arbitration:

> To reject this arbitration agreement provision, you must send [SunTrust] written notice of your decision so that we receive it at the address listed below by the later of October 1, 2010 or within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations along with your name, address, Account name, Account number and your signature and must be mailed to the SunTrust Bank Legal Department, Attn: Arbitration Rejection, P.O. Box 2848, Mail Code 2034, Orlando, FL 32802-2848. This is the sole and only method by which you can reject this arbitration agreement provision. Rejection of this arbitration agreement provision will not affect any remaining terms of these rules and regulations and will not result in any adverse consequence to you or your Account. You agree that our business records will be final and conclusive with respect to whether you rejected this arbitration agreement provision in a timely and proper fashion. **This arbitration agreement provision will apply to you and us and to your**

> **Account unless you reject it by providing proper and timely notice as stated herein.**

(Triplett Aff. Exh. D at 23). Notably, this provision specifically states that "this is the sole and only method" by which the account holder can reject arbitration. Allowing the filing of this lawsuit to constitute an "opt out" on behalf of all putative class members would contradict this explicit contractual language.

The Court is well aware of the high costs that an individual would have to incur to seek a potential recovery without class certification, and the reality that very few, if any, potential class members will challenge the fees at issue in this case. However, even in cases such as this, that involve low-value claims, the Unite States Supreme Court recently reiterated that "the FAA's command to enforce arbitration agreements *trumps any interest in ensuring the prosecution of low-value claims.* The latter interest, we said, is 'unrelated' to the FAA. Accordingly, the FAA does *…favor the absence of litigation when that is the consequence of a class-action waiver,* since its 'principal purpose' is the enforcement of arbitration agreements according to their terms." *Am. Express Co. v. Italian Colors Rest.,* 133 S. Ct. 2304, 2312 n.5, 186 L. Ed. 2d 417 (2013) (internal citations omitted) (emphasis added). This being so, this Court cannot ignore the plain terms of the Arbitration Agreement so as to avoid SunTrust's right to demand arbitration of the claims of those customers who did not opt out of arbitration.

CONCLUSION

Plaintiff is the only potential class member who opted out of arbitration. Because the other potential class members did not opt out and thus remain subject to an

enforceable arbitration agreement, Plaintiff cannot satisfy the numerosity requirement and may not pursue this suit as a class action. Having made this determination, the Court need not address the remaining requirements for class certification. Likewise, it is unnecessary to address the conscionability and enforceability of the Litigation Class Action Waiver. Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion for Class Certification is **DENIED**.

This 19th day of February, 2014.

/s/ Susan E. Edlein

Susan E. Edlein

Judge, State Court of Fulton County

APPENDIX J

IN THE STATE COURT OF FULTON COUNTY STATE OF GEORGIA

JEFF BICKERSTAFF, JR., on behalf of himself and all persons similarly situated, Plaintiff, v. SUNTRUST BANK, Defendant.	CIVIL ACTION FILE NO. 10-EV-010485-H

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY ACTION

Before the Court is a Motion to Compel Arbitration and Stay Action (the "Motion to Compel Arbitration" or "Motion") filed by Defendant SunTrust Bank ("SunTrust"). For the following reasons, SunTrust's Motion is **DENIED.**

BACKGROUND

I. Plaintiff's SunTrust Account and the Arbitration Provision

On February 2, 2009, Plaintiff Jeff Bickerstaff, Jr. opened a personal checking account with SunTrust. (Triplett Aff. ¶ 4). As a condition to opening the account, Plaintiff, like all SunTrust customers, was required to agree to be bound by SunTrust's Rules and Regulations for Deposit Accounts ("Rules and Regulations"). (Triplett Dep. at 14-15). The Rules and Regulations covered 40

pages and were drafted by SunTrust. (Triplett Aff. ¶¶ 5-6, Exh. B; Triplett Dep. at 14-15). They were offered by SunTrust on a take it or leave it basis and not open to negotiation. (Triplett Dep. at 14-15).

When Plaintiff opened his account, the Rules and Regulations included a mandatory arbitration provision pursuant to which Plaintiff and SunTrust were required, with the exception of certain Excluded Claims or Proceedings, to submit any disputes or claims "concerning, arising out of or relating to the Account" to binding arbitration. (Triplett Aff. Exh. B at 22). Excluded Claims or Proceedings include: (i) any individual action brought in small claims court or an equivalent court, unless transferred, removed, or appealed to a different court; (ii) the exercising of any self-help rights, including repossession, replevin, set-off, attachment, recoupment and foreclosure; or (3) any other form of relief allowed by law to enforce a security interest. (*Id.* at 24).

The arbitration provision includes both a class action waiver and a mandatory, prevailing-party fee shifting provision. The class action waiver provides that:

> Notwithstanding any other provision to the contrary, if either you or we elect to arbitrate a Claim, neither you nor we will have the right: (a) to participate in a class action in court or in arbitration, either as a class representative, class member or class opponent; or (b) to join or consolidate Claims with claims of any other persons. No arbitrator shall have authority to conduct any arbitration in violation of this provision.
>
> The parties to these [R]ules and [R]egulations

> acknowledge that the waiver of class actions is material and essential to the arbitration of any disputes between the parties and is nonseverable from this agreement to arbitrate a Claim. If the waiver of class actions is limited, voided or found unenforceable, then the parties' agreement to arbitrate (except for this sentence) shall be null and void with respect to such proceeding, subject to the right to appeal the limitation or invalidation of the waiver of class actions. The parties acknowledge and agree that under no circumstances will a class action be arbitrated.

(*Id.* at 23). The fee shifting provision states that the "prevailing party shall be entitled to an award of the costs and expenses of the arbitration including an award of reasonable attorneys' fees for any Claim(s) in which the party has prevailed, except as otherwise required by applicable law." (*Id.* at 24).

II. SunTrust's Changes to the Rules and Regulations

Under their terms, the Rules and Regulations could "be changed from time to time by [SunTrust] without notice unless otherwise required by applicable laws or regulations." (*Id.* at i). SunTrust exercised this authority to unilaterally change the Rules and Regulations on two pertinent occasions after Plaintiff opened his account.

A. The October 1, 2009 Change to the Rules and Regulations

First, on October 1, 2009, SunTrust changed the Rules and Regulations to include a provision allowing new customers to reject and opt out of the arbitration

agreement. (Triplett Aff. ¶ 6, Exh. C at 22-23; Triplett Dep. at 17-18). This provision read as follows:

> **Right to Reject Arbitration Agreement.** You may reject this arbitration agreement provision and therefore not be subject to being required to resolve any dispute, controversy or claim by arbitration. To reject this arbitration agreement provision, you must send [SunTrust] written notice of your decision so that we receive it at the address listed below within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations along with your name, address, Account name, Account number and your signature and must be mailed to the SunTrust Bank Legal Department, Attn: Arbitration Rejection, P.O. Box 2848, Mail Code 2034, Orlando, FL 32802-2848. This is the sole and only method by which you can reject this arbitration agreement provision. Rejection of this arbitration agreement provision will not affect any remaining terms of these rules and regulations and will not result in any adverse consequence to you or your Account. You agree that our business records will be final and conclusive with respect to whether you rejected this arbitration agreement provision in a timely and proper fashion. **This arbitration agreement provision will apply to you and us and to your Account unless you reject it by providing proper and timely notice as stated herein.**

(Triplett Aff. Exh. C at 22-23). SunTrust did not provide

Plaintiff or its other existing customers with any notice of this change to the Rules and Regulations. (Triplett Dep. at 42-43). Although a copy of the current version of the Rules and Regulations was available at any SunTrust branch office and on SunTrust's website, (Triplett Aff. at ¶ 5), SunTrust did not expect its customers to regularly check to see if the Rules and Regulations had been revised to include new rights or obligations. (Triplett Dep. at 66).

B. The June 1, 2010 Change to the Rules and Regulations

Eight months later, on June 1, 2010, SunTrust changed the opt-out provision to extend the right to reject and opt out of the arbitration agreement to existing customers. (Triplett Aff. at ¶ 6, Exh. D at 23; Triplett Dep. at 17-18). The revised opt-out provision read as follows:

> **Right to Reject Arbitration Agreement.** You may reject this arbitration agreement provision and therefore not be subject to being required to resolve any dispute, controversy or claim by arbitration. To reject this arbitration agreement provision, you must send [SunTrust] written notice of your decision so that we receive it at the address listed below by the later of October 1, 2010 or within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations along with your name, address, Account name, Account number and your signature and must be mailed to the SunTrust Bank Legal Department, Attn: Arbitration Rejection, P.O. Box 2848, Mail Code 2034, Orlando, FL 32802-2848. This is the

> sole and only method by which you can reject this arbitration agreement provision. Rejection of this arbitration agreement provision will not affect any remaining terms of these rules and regulations and will not result in any adverse consequence to you or your Account. You agree that our business records will be final and conclusive with respect to whether you rejected this arbitration agreement provision in a timely and proper fashion. **This arbitration agreement provision will apply to you and us and to your Account unless you reject it by providing proper and timely notice as stated herein.**

(Triplett Aff. Exh. D at 23). Although this change was effective as of June 1, 2010, SunTrust did not notify Plaintiff (or its other existing customers) of the change at or near that time. (Triplett Dep. at 18, 41).

The only purported notice concerning the June 1, 2010 change was in Plaintiffs monthly account statement dated August 24, 2010. (Triplett Aff. ¶ 7, Exh. E; Triplett Dep. at 41). This account statement, however, did not mention the opt-out right or its June 1, 2010 effective date, but instead included the following announcement:

> AN UPDATED VERSION OF THE "RULES AND REGULATIONS FOR DEPOSIT ACCOUNTS", WHICH GOVERNS YOUR ACCOUNT, IS NOW AVAILABLE AND CAN BE OBTAINED AT ANY BRANCH OFFICE OR AT WWW.SUNTRUST.COM/ RULESANDREGULATIONS. ALL FUTURE TRANSACTIONS ON YOUR ACCOUNT WILL BE GOVERNED BY THESE

UPDATED RULES AND REGULATIONS.

(Triplett Aff. Exh. E).[1] Although this language suggests that only future transactions would be governed by the updated Rules and Regulations, SunTrust maintains that the update was actually effective as of June 1, 2010. (*See* SunTrust's Reply Br. in Support of Mot. to Compel at 25-27; Triplett Dep. at 18, 38-39).

III. Plaintiff's Claims

On July 12, 2010, Plaintiff filed his Complaint in this case alleging that, pursuant to SunTrust's automated

[1] SunTrust uses its monthly account statements to communicate pertinent information to its customers concerning their accounts. (Triplett Dep. at 21, 28-29). Plaintiffs account statements reflect that SunTrust routinely used the statements to provide specific notice regarding account changes and new policies enacted by SunTrust. (*See e.g.*, Triplett Dep. Exh. 3 (providing notice that effective May 1, 2009, the per item fee for stop payments, unavailable funds, insufficient funds, and the extended overdraft fee will increase to $36); Triplett Dep. Exh. 9 (providing notice that, effective November 14, 2009, for overdraft protection clients, the amount transferred from another account to the overdrawn account would no longer be based on $100 increments, but instead would be the actual overdraft amount plus any applicable fees); Triplett Dep. Exh. 12 (providing notice of privacy policy brochure, a copy of which was enclosed with account statement); Triplett Dep. Exh. 16 (providing notice on April 23, 2010 that, effective March 1, 2010, due to Federal Reserve Check Clearing Consolidation, all U.S. checks deposited would be treated as local checks, shortening the time funds might be unavailable from 5 to 2 days in most cases); Triplett Dep. Exh. 17 (providing notice that on August 14, 2010, federal regulations change how SunTrust pays overdrafts on ATM and debit card transactions and notifying customers that they may chose to request this service or SunTrust will decline the item if it exceeds the available balance); Triplett Dep., Exh. 19 (providing notice on July 23, 2010 that, effective July 1, 2010, SunTrust would no longer assess overdraft fees on items less than $5)).

overdraft program for bank cards, between February 2, 2009 and April 4, 2010, he was on more than one occasion charged with overdraft fees. (Compl. at ¶ 89). Plaintiff contends that these overdraft fees amount to interest charges that exceed Georgia's civil and criminal usury limits. (*Id.* at ¶¶ 14, 85-100). Plaintiff asserts claims for: (1) violation of Georgia's civil usury laws, O.C.G.A. § 7-4-2; (2) violation of Georgia's criminal usury laws, O.C.G.A. § 7-4-18; (3) conversion; and (4) money had and received. (First Am. Compl. at ¶¶ 16, 87-119).[2] Plaintiff asserts these claims on behalf of himself and a proposed class that includes any person:

> a. Who was on the date Plaintiff filed this Complaint, and has thereafter continuously remained through the date this Court certifies this action as a class action, a citizen of Georgia; and
>
> b. To whom SunTrust in the administration of its Automated Overdraft Program made an advance of money in an amount less than $3,000; and
>
> c. From whom SunTrust collected such advance and one or more charges in connection with the advance, including, but not limited to, an Overdraft Fee and/or Extended Overdraft Fee, as applicable, within four years of the date Plaintiff filed this Complaint.

(*Id.* at ¶ 70).

At SunTrust's request, on August 11, 2010, Plaintiff stipulated to a 30-day extension of SunTrust's time to

[2] Plaintiff filed a First Amended Complaint on August 9, 2010.

answer Plaintiff's claims. (Stipulation dated 8/11/10). Thereafter, on September 13, 2010, SunTrust filed an Answer asserting that the claims of Plaintiff and the putative class members "are subject to a valid and enforceable arbitration agreement." (Answer of SunTrust at 21). SunTrust's Answer did not reference Plaintiffs right to opt out of the arbitration agreement provision or the upcoming October 1, 2010 deadline for Plaintiff to exercise that right. Instead, the Answer states that "SunTrust requests that Plaintiff immediately dismiss the Complaint and file his claims in arbitration and if he fails to do so, SunTrust moves and requests this Court to order Plaintiff to do so." (*Id.*).

IV. SunTrust's Motion to Compel Arbitration

On Monday, October 4, 2010, the first business day after the October 1, 2010 opt-out deadline, SunTrust filed its Motion to Compel Arbitration and disclosed the opt-out provision. Relying on Plaintiff's failure to send the written notice specified in the opt-out provision rejecting arbitration by the October 1, 2010 deadline, SunTrust contends that the Court must stay this action and compel Plaintiff to submit his claims to arbitration.

In response, Plaintiff argues that the arbitration agreement is unconscionable under Georgia law and thus unenforceable. According to Plaintiff, the arbitration agreement is unconscionable because the combined effect of the class action waiver and the prevailing-party fee shifting provision is to insulate SunTrust from liability for small dollar claims such as those asserted by Plaintiff in this action. Plaintiff contends that SunTrust customers will not be willing to individually pursue low dollar claims due to the attendant risk that they will be required to pay

SunTrust's attorney's fees and expenses – which will undoubtedly far outweigh the amount the customer seeks to recover.

Plaintiff also argues that SunTrust's Motion should be denied because SunTrust waived the right to arbitrate by waiting until after the October 1, 2010 opt-out deadline passed to file the Motion and disclose for the first time the existence of the opt-out right. Plaintiff maintains that neither he nor his counsel was aware of the opt-out provision until SunTrust filed this Motion. (*See* Pl.'s Surreply to Def. SunTrust's Mot. to Compel Arbitration and Stay Action at 28 (stating that Plaintiff and his counsel did not know about the opt-out provision until SunTrust filed its Motion to Compel Arbitration and that Plaintiff "certainly would have taken advantage of" the opt-out provision if given the opportunity); *see also* May 17, 2011 Hearing Transcript at 65-71 (representing to Court that Plaintiff failed to mail the notice described in the opt-out provision because neither Plaintiff nor Plaintiff's counsel received notice of or was aware of the opt-out provision)).[3] Plaintiff asserts that SunTrust's delay was strategic and designed to deprive him of the opt-out right.

Plaintiff further contends that SunTrust's Motion should be denied because, despite SunTrust' s efforts, he effectively opted out of arbitration by filing this lawsuit. In this regard, Plaintiff points out that SunTrust's legal department clearly knew about Plaintiffs lawsuit prior to the October 1, 2010 opt-out deadline. By that date, SunTrust had already retained outside counsel to defend the lawsuit, filed its Answer, and even begun working with

[3] On May 17, 2011, the Court heard oral argument on SunTrust's Motion.

its employees to prepare affidavits in support of its Motion to Compel Arbitration.

ANALYSIS

At the outset, the Court agrees with SunTrust that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, governs the parties' arbitration agreement.[4] Under the FAA, written agreements to arbitrate a dispute arising out of a transaction involving interstate commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As described by the United States Supreme Court, this provision reflects "both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract[.]'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citations omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms[.]" *Id.* at 1745-46 (citations omitted). Agreements to arbitrate may therefore be invalidated by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Id.* at 17 46 (quoting *Doctor's*

[4] This point is not disputed by Plaintiff. Moreover, the arbitration agreement specifically provides that the FAA shall govern. *See* (Triplett Aff. Exh. B at 23); *see also, Triad Health Mgmt. of Ga. v. Johnson*, 298 Ga. App. 204, 206, 679 S.E.2d 785 (2009) ("'If the intent of the parties indicates that arbitration would be governed by the FAA, this Court will enforce the intentions of the parties.") (quoting *Results Oriented v. Crawford*, 245 Ga. App. 432, 437, 538 S.E.2d 73) (2000)).

Associates, Inc. v. Casarotto, 517 U.S. 681,687, 116 S. Ct. 1652 (1996)).

"[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S. Ct. 3346 (1985). In making this determination, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Johnson v. Circuit City Stores, Inc.,* 148 F.3d 373,377 (4th Cir. 1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920 (1995)); *see also, Johnson*, 298 Ga. App. at 206, 679 S.E.2d 785 ("Whether there is a valid agreement to arbitrate is generally governed by state law principles of contract formation, and is appropriate for determination by the court."). As the United States Supreme Court has instructed, however, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927 (1983). Pursuant to that liberal policy, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." 460 U.S. at 24-25, 103 S. Ct. 927.

Being mindful of the liberal federal policy in favor of arbitration, the Court finds that the SunTrust arbitration agreement is not unconscionable under Georgia law. The Court, however, nevertheless concludes that arbitration should not be compelled under the facts of this case because Plaintiff effectively exercised his right to opt out of arbitration by filing this lawsuit. Moreover, even if

Plaintiff had failed to satisfy his obligations under the opt-out provision, such failure was attributable to SunTrust's actions and therefore excused.

I. The Arbitration Agreement is Not Unconscionable

The parties agree that Georgia law provides the relevant principles of contract law for purposes of this Motion. Under Georgia law, an unconscionable contract is broadly defined as "such an agreement as no sane man not acting under a delusion would make and that no honest man would take advantage of." *R.L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 966, 214 S.E.2d 360 (1975) (quoting *Hall v. Wingate,* 159 Ga. 630, 126 S.E. 796 (1924)). "[T]he basic test for determining unconscionability is 'whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.'" *NEC Techs., Inc. v. Nelson*, 267 Ga. 390, 391,478 S.E.2d 769 (1996) (quoting *Ferguson*, 233 Ga. at 965, 214 S.E.2d 360). "Georgia law recognizes both procedural and substantive unconscionability." *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007). "Procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves." *NEC Technologies*, 267 Ga. at 392, 478 S.E.2d 769.

The very same arbitration agreement at issue in this case was recently considered by the Eleventh Circuit Court of Appeals and held to be conscionable and enforceable under the above principles of Georgia contract law. *Buffington v. SunTrust Banks, Inc.*, No. 11-14316, 2012 U.S. App. LEXIS 4180 (11th Cir. March 1,

2012). In so holding, the Eleventh Circuit specifically ruled that the arbitration agreement is neither substantively unconscionable nor procedurally unconscionable. *Id.* at *7-10. Although this Court is not bound by Eleventh Circuit authority, the Court agrees with that court's conclusion that the SunTrust arbitration agreement is not unconscionable.

Plaintiff contends that a different result is appropriate here because the Eleventh Circuit in *Buffington* did not specifically address his argument in this case that "it is the combination of the class-action ban with the fee-shifting provision in the arbitration provision that renders SunTrust's arbitration provision unconscionable." (Pl.'s Resp. to Def. SunTrust Bank's Notice of Supplemental Authority in Supp. of Mot. to Compel Arbitration and to Stay Action, dated March 7, 2012, at 10). The Court is not persuaded by this argument.

As an initial matter, although the Eleventh Circuit's opinion did not specifically address the combined effect of the class action ban and prevailing-party fee shifting provision, the district court clearly did consider this argument. In its initial ruling denying SunTrust's motion to compel arbitration, the district court relied on the same argument Plaintiff makes in this case to hold the arbitration agreement unconscionable. *See In re Checking Account Overdraft Litig.,* 734 F. Supp. 2d 1279, 1292 (S.D. Fla. 2010) ("Applying Georgia law, the Court finds that the class action waiver in SunTrust's Agreement, viewed in conjunction with the [fee-shifting risk], is also substantively unconscionable."), *vacated and remanded, Buffington v. SunTrust Banks, Inc.,* 425 Fed. Appx. 830 (11th Cir. 2011). However, after that ruling was vacated and the case remanded by the Eleventh Circuit

for reconsideration in light of the United States Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), the district court changed course and ruled that the arbitration agreement was unconscionable based on the combined effect of the prevailing-party fee shifting provision and a set-off provision that would allow the bank to collect shifted fees directly from a customer's account. *In re Checking Account Overdraft Litig.*, MDL No. 2036, 2011 U.S. Dist. LEXIS 118462, at *49-57 (S.D. Fla. Sept. 1, 2011), *reversed and remanded, Buffington v. SunTrust Banks, Inc.*, No. 11-14316, 2012 U.S. App. LEXIS 4180 (11th Cir. March 1, 2012). In this second ruling, the district court recognized that after the Supreme Court's decision in *Concepcion*, "courts may not invalidate arbitration agreements simply because they contain class action waivers, even if, as a practical matter, the class action waiver has a claim-suppressing effect." *Id.* at *43 (internal quotations omitted). Had the Eleventh Circuit disagreed with the district court on this aspect of the unconscionability issue, and believed the combined effect of the class action ban and prevailing-party fee shifting provision invalidated the arbitration agreement, it could have affirmed the district court's denial of SunTrust's motion to compel arbitration on that basis. *See Alvarez v. Royal Atl. Developers, Inc.*. 610 F.3d 1253, 1264 (11th Cir. 2010) ("The district court's decision may be affirmed if the result is correct, even if the court relied upon an incorrect ground or gave a wrong reason.") (citing *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1433 n.9 (11th Cir. 1998)); *see also Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 459 (1943) (decision of lower court must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason).

The Court is not persuaded by Plaintiffs argument for the additional reason that it largely ignores that Plaintiff can avoid the combined effect of the class action ban and the prevailing-party fee shifting provision by bringing his claims in small claims court. If brought in such a forum, Plaintiffs claims would qualify as Excluded Claims and thus not be subject to the mandatory, prevailing-party fee shifting provision.

Plaintiff suggests that the option of proceeding in small claims court does not change the analysis because his civil and criminal usury claims are too complicated for an individual to pursue without counsel. (Pl.'s Resp. to Def.' s Motion to Compel Arbitration and Stay Case at 36, n.19). Indeed, Plaintiff contends claims like his are too small and too factually and legally complex to be litigated by an attorney for an individual client. (*Id.* at 36). Thus, according to Plaintiff, such claims will not be remedied at all without the class action mechanism. (*Id.*).

Setting aside whether Plaintiff might be overstating the complexity of his claims, his argument on this point contemplates that the class action ban alone renders the arbitration agreement unconscionable. This position is untenable, however, in the wake of the United States Supreme Court's decision in *Concepcion.* In *Concepcion,* the same public policy argument Plaintiff makes here was expressly made by the dissent and specifically rejected by the Court. *Concepcion*, 131 S. Ct. at 1753 ("The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."); *see also, Cruz v. Cingular Wireless, LLC,* 648 F.3d 1205, 1212 (11th Cir. 2011) (recognizing

that the Concepcion Court specifically rejected the public policy argument that a class action waiver is unenforceable because it would exculpate the defendant from liability under state law). "The [FAA] being a Federal statute, decisions of the United States Supreme Court construing and applying it are binding upon this court." *Central of G.R. Co. v. Brotherhood of R.R. Trainmen*, 211 Ga. 263, 265, 85 S.E.2d 413 (1955).

II. Plaintiff Effectively Exercised His Right to Opt Out of Arbitration

Having determined that the Sun Trust arbitration agreement originally entered into by Plaintiff is conscionable, the question becomes whether Plaintiff exercised his right to opt out of the arbitration agreement. The Court concludes that he did.

"The general rule in determining contract compliance is substantial compliance, not strict compliance[.]" *Rome Healthcare, LLC v. Peach Healthcare Sys., Inc.* 264 Ga. App. 265, 272, 590 S.E.2d 235 (2003) (citing *Dennard v. Freeport Minerals Co.,* 250 Ga. 330, 332, 297 S.E.2d 222 (1982)); *see also,* O.C.G.A. § 13-4-20 ("Performance, to be effectual, . . . must be substantially in compliance with the spirit and the letter of the contract and completed within a reasonable time."); *DI Unif. Servs., Inc. v. United Water Unlimited Atlanta, LLC,* 254 Ga. App. 317, 322-23, 562 S.E.2d 260 (2002) (holding that party's actions with respect to termination clause in contract "must be reviewed for substantial compliance, not strict compliance"). Under the facts of this case, the Court believes that, by filing his Complaint and First Amended Complaint before the October 1, 2010 opt-out deadline, Plaintiff substantially complied with his obligations under

the opt-out provision. The Court reaches this decision because all the information required under the opt-out provision was communicated to or made readily available to SunTrust's legal department by Plaintiff's pleadings.

First, it is clear that SunTrust's legal department was aware prior to the October 1, 2010 opt-out deadline that Plaintiff had initiated this lawsuit. Indeed, as Plaintiff notes, by the time the October 1, 2010 deadline arrived, SunTrust had retained outside counsel, filed an Answer to Plaintiff's claims, and its legal department had worked to complete at least one employee affidavit in support of the Motion to Compel Arbitration. (Aff. of R. Triplett, dated September 29, 2010; Triplett Dep. at 6-7). Furthermore, using Plaintiff's name, SunTrust was able to retrieve Plaintiff's address and account information. (*See* Triplett Dep. at 8-11).

In addition, the Court is not persuaded by SunTrust's argument that Plaintiff's initial pleadings did not provide the bank with notice that Plaintiff intended to reject arbitration. The Complaint and First Amended Complaint, which were prepared by counsel and span 28 and 31 pages, respectively, clearly assert claims that would otherwise be covered by the arbitration agreement. In the Court's view, these pleadings should have put SunTrust on notice that Plaintiff, who according to SunTrust had a right to opt-out of arbitration, intended to reject arbitration.[5]

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[5] At oral argument, SunTrust's counsel asserted that filing a lawsuit is not inconsistent with arbitration and does not necessarily reflect an intention to reject arbitration. According to counsel, the arbitration agreement does not prohibit either party from filing a lawsuit, but instead simply allows the other party the right to compel arbitration

III. Any Failure by Plaintiff to Sufficiently Comply With the Opt-Out Provision is Excused by SunTrust's Actions

In determining that arbitration should not be compelled, the Court also finds that any failure by Plaintiff to sufficiently comply with his obligations under the opt-out provision was attributable to SunTrust's own conduct and therefore excused.

It is undisputed that SunTrust did not notify Plaintiff when it unilaterally amended the Rules and Regulations on June 1, 2010. Indeed, SunTrust concedes that the only notice of any sort concerning the June 1, 2010 amendment was provided in Plaintiffs August 24, 2010 monthly account statement. This account statement, however, did not reference the opt-out right or the procedures upon which SunTrust now relies, but instead merely indicated that an "updated version" of the Rules and Regulations was available.

More importantly, the August 24, 2010 account statement did not reference the June 1, 2010 effective date for the updated version of the Rules and Regulations. Rather, it stated that "all future transactions" on Plaintiff's account would be governed by the updated version. The natural conclusion to be drawn from this language is that the updated version of the Rules and

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if a lawsuit is filed asserting claims that are subject to arbitration. (May 17, 2011 Hearing Transcript at 58-59; *see also* Def.'s Reply to Pl.'s Br. Filed March 7, 2012, at 3). In the Court's view, this argument ignores and is rendered unpersuasive by the existence of the opt-out right. When a party with the right to reject arbitration files a lawsuit asserting claims that would otherwise be subject to mandatory arbitration, reason dictates that the party prefers to litigate his claims and has rejected arbitration.

Regulations would have no bearing on transactions that occurred prior to August 24, 2010, including Plaintiffs lawsuit filed over a month earlier on July 12, 2010. As such, the Court finds that the August 24, 2010 statement was misleading and did not provide Plaintiff adequate notice of the opt-out right.

Notably, SunTrust's silence concerning the opt-out right continued even after it learned that Plaintiff had filed this lawsuit and while SunTrust's counsel negotiated a 30-day extension of the bank's time to answer Plaintiffs claims. Even Sun Trust's Answer, which asserts that Plaintiffs claims are subject to a valid and enforceable arbitration agreement, makes no mention of the opt-out right or the opt-out deadline. It was only after the opt-out deadline passed, that SunTrust filed the present Motion and finally disclosed the Plaintiffs right to opt out of arbitration.

The predictable result of SunTrust's conduct is that Plaintiff and his counsel were not aware of the requirements of the opt-out provision. Having failed to advise Plaintiff of his rights and the requirements to exercise those rights, SunTrust cannot now rely on Plaintiffs purported failure to comply in order to compel arbitration.[6] Under federal law, a party waives its right to

[6] On this point, it is no answer to say that the Rules and Regulations allow SunTrust to make changes without notice. If SunTrust were allowed to make such changes to Plaintiffs rights and obligations without notice and insist on strict compliance with the changed Rules and Regulations, it would then be incumbent upon Plaintiff to continuously monitor the copy of the Rules and Regulations available at the bank's branch offices and on its website. SunTrust does not expect this of its customers. (Triplett Dep. at 66). Indeed, even the SunTrust Senior Vice President that has offered testimony in this case on behalf of the bank does not do this. (*Id*). Furthermore, the

arbitrate if, "under the totality of the circumstances, the party has acted inconsistently with the arbitration right, and, in so acting, has in some way prejudiced the other party." *Ed Voyles Jeep-Chrysler v. Wahls*, 294 Ga. App. 876, 877, 670 S.E.2d 540 (2008) (quoting *USA Payday Cash Advance Center #1 v. Evans*, 281 Ga. App. 847, 849, 637 S.E.2d 418 (2006)). In the Court's view, the issue here is not whether SunTrust waived the right to arbitrate, but rather whether it waived any right to insist on strict compliance with the opt-out provision by Plaintiff. Applying the same waiver principles, the Court concludes that SunTrust's actions in failing to disclose the opt-out provision were inconsistent with its rights under that provision and prejudiced Plaintiff by preventing him from strictly complying with the provision.[7]

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relevant language of the Rules and Regulations does not allow SunTrust to make changes without notice if "applicable laws or regulations" require that notice be given. (Triplett Aff., Exh. B at i).

[7] The Court also concludes that Plaintiffs failure to strictly comply with the opt-out provision should be excused under the well-established principle of Georgia contract law that "[i]f the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance." O.C.G.A. § 13-4-23.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant SunTrust Bank's Motion to Compel Arbitration and Stay Action is **DENIED.**[8]

This 16th day of March, 2012.

/s/ Susan E. Edlein
Susan E. Edlein
Judge, State Court of Fulton County

[8] The Court's Order should not be read to include any ruling on whether Plaintiff has opted out or could opt out of the arbitration agreement on behalf of not only himself, but also the entire purported class. Although Plaintiff contends that he opted out on behalf of the entire class, this issue is not properly before the Court at this time and has not been adequately addressed by the parties.